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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-761

AMERICAN TELEPHONE AND TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INC.; and
BELL TELEPHONE LABORATORIES, INC., *Petitioners,*
v.
UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INC.; and
BELL TELEPHONE LABORATORIES, INC., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari be issued under 28 U.S.C. § 1254(1) to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this cause on October 31, 1978, which denied a petition for a writ of mandamus under 28 U.S.C. §1651(a) to review an order entered by the United States District Court for the District of Columbia (Judge Harold H. Greene, presiding) on September 11, 1978.

OPINIONS BELOW

The judgment of the Court of Appeals dated October 31, 1978, which is not reported, is annexed hereto as Appendix A. The opinion and orders of the district court dated September 11, 1978, which are not reported, are annexed hereto as Appendix B. The opinion of the district court denying petitioners' motion

for reconsideration, dated October 18, 1978, which is not reported, is annexed hereto as Appendix C. A related opinion dated October 9, 1978, of the United States District Court for the Northern District of Illinois in *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 74 C 633, which is not reported, is annexed hereto as Appendix D.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 31, 1978. The jurisdiction of this Court to issue a writ of certiorari under 28 U.S.C. § 1254(1) to review the judgment of the court of appeals is established by the following decisions of this Court:

Schlagenhauf v. *Holder*, 379 U.S. 104 (1964);

Kerr v. *United States District Court for the Northern District of California*, 426 U.S. 394 (1976).

QUESTION PRESENTED

Whether a federal district court may, under Rule 34 of the Federal Rules of Civil Procedure, order the wholesale production of documents produced in other litigation, even though the documents contain material that is irrelevant to the action in which such wholesale production is required, even though the documents involved reflect the fruits of work done by counsel in other litigation during a period when discovery was stayed in the action in which they are required to be produced, and even though the documents involved were produced under protective orders which limited

their use to the litigation in which they were originally produced.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Federal Rules of Civil Procedure—Rules 26 and 34—are set forth in Appendix E to this petition.

STATEMENT OF FACTS

The action out of which this petition arises was filed by the United States against petitioners on November 20, 1974, charging that petitioners have conspired to monopolize, and monopolized, telecommunications service and equipment markets. Shortly after the complaint was filed, the Government embarked upon a massive discovery program designed to support the broad charges encompassed within the complaint and the drastic divestiture relief it is seeking. The Government initiated this discovery program by filing requests under Rule 34 of the Federal Rules of Civil Procedure seeking production of documents from the files of each of the defendants as well as from each of the operating telephone companies in which AT&T holds a majority interest. These broad requests would have required the Bell System to search more than one-third of all the System's files and to produce vast quantities of this material to the Government for inspection and possible copying (Affidavit of Mr. F. Fox Stoddard, filed in the district court on February 18, 1975, p. 6).

Shortly thereafter, defendants filed discovery requests of their own under Rule 34, in which they sought access to relevant documents in the possession of governmental agencies, including the agencies that have regulated the Bell System's conduct under the Communications Act (47 U.S.C. § 151 *et seq.*), agencies

that have attempted to influence regulatory policies, agencies that have made special demands upon the Bell System to meet national defense, security and other needs which influenced Bell System practices, and numerous other agencies involved in telecommunications and telecommunications-related matters. The number of documents called for by defendants' Rule 34 requests, although far fewer than those sought by the Government, nonetheless was also substantial.

Given the magnitude of the discovery burdens faced by both parties, informal negotiations were commenced almost immediately in an effort to reduce these burdens and to develop a mutual plan for discovery which would be fair to both parties and facilitate the discovery process. A number of meetings were held for this purpose in December of 1974 and in January and February of 1975. At the outset of these negotiations, the Government took the position that any agreed discovery plan would have to reflect two fundamental principles: first, that defendants would make a document-by-document search of their files for the material sought in the Government's document requests; and, secondly, that the Government was under no obligation to produce, or even to preserve, relevant materials in the possession of governmental agencies other than the Department of Justice (Letter of February 6, 1975, from Philip L. Verveer, Esq. to Harold S. Levy, Esq.). The defendants found both of these positions unacceptable. A document-by-document search of the kind insisted upon by the Government would have cost the Bell System some $300 million (Stoddard Affidavit, p. 9); defendants suggested, as an alternative, that the Government accept the discovery approach that was then already being used in *MCI Communications Corp.*

v. *American Tel. & Tel. Co.*, 74 C 633 (N.D. Ill.), in which the parties had agreed that, where they found it more convenient to do so, they could simply produce their files in bulk so that the discovering party could review them for relevant documents.[1] Insofar as the Government's position with respect to its own obligations to produce under Rule 34 was concerned, defendants simply refused to accept such an approach to discovery because, without discovery from other governmental agencies under Rule 34, defendants did not regard the discovery program advocated by the Government as being reciprocal and mutual, or even as one affording them a fair opportunity to defend themselves.

The parties were unable to resolve these differences.[2] Accordingly, on February 18, 1975, defendants filed a

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[1] The document request served upon the defendants in the *MCI* case was almost as broad as the requests served by the Government, the principal difference being that the *MCI* request did not require the production of documents from Western Electric or Bell Laboratories. Despite the breadth of this request, the Bell System had agreed to produce, without objection, the documents requested under a protective order agreed to by the parties, and entered as an order of the district court in that case on August 6, 1974 (App. F), which provided that all discovery in the case was to be used "solely in the preparation or trial of this action" (*id.* at 105a).

[2] During the course of these negotiations, specifically at a meeting of counsel on December 19, 1974, Government counsel expressly declined to coordinate discovery in the Government case with discovery in the *MCI* case. Moreover, adverting to a suggestion that apparently had previously been made to Government counsel directly by counsel for MCI that the Government share the burdens and expenses of the document selection process with MCI, Government counsel stated categorically that the Department of Justice intended to conduct and rely exclusively upon its own discovery in *United States* v. *American Tel. & Tel. Co.*, and that it had no interest in the discovery being conducted by MCI (Affidavit of Harold S. Levy, filed in the district court on May 5, 1978, pp. 3-4).

motion asking the district court to establish discovery procedures. In that motion, defendants specifically asked the district court to resolve the controversy over the need for a document-by-document search, as well as the controversy over defendants' right to discovery from other governmental agencies under Rule 34. At a hearing on February 20, 1975, however, the district court declined to rule on these aspects of petitioners' motion. Instead, the court stated that based upon a review of the pleadings it had concluded "that there are certain defenses that have been raised that probably should be considered before discovery progressed" (Transcript of Proceedings in the district court, February 20, 1975, p. 3) and ordered the parties to file memoranda directed to "whether this action is barred in whole or in part by virtue of the Communications Act and other federal and state regulatory statutes and by the regulations over activities of defendants" (Pretrial Order No. 2, entered by the district court on February 27, 1975).[3] In the interim, the district court, *on its own motion,* stayed all discovery pending its action on the jurisdictional memoranda of the parties (Pretrial Order No. 3, entered by the district court on February 27, 1975). With minor interruptions, this stay remained in effect until November 28, 1977,[4] dur-

[3] The court also directed the parties to address the issue of whether the action was barred in whole or part by the 1956 consent decree which terminated a 1949 antitrust suit by the Government against petitioners.

[4] Because of the importance of the jurisdictional issue, the district court requested a series of supplemental memoranda on that issue from the parties and memoranda from the Federal Communications Commission as *amicus curiae*. For this reason, the court did not reach a decision on the jurisdictional issue until November 16, 1976, at which time the court ruled that it was "satisfied that it has antitrust jurisdiction of at least some of the aspects of the case" (427 F. Supp. 57, 61 (D.D.C. 1976)). Thereafter, the Bell

ing which period no discovery whatever was conducted by either party.

At the same time, however, document production continued virtually to completion in the *MCI* case under the protective order that had been entered in that case (App. F). The Bell System alone produced more than seven million pages of documentary material from its files—including virtually all of the files of many of its top executives and the files of the various policy committees and councils of the Bell System—of which MCI copied approximately 1.5 million pages, and thousands of pages of deposition testimony were taken from Bell System officers, managers and consultants. Because of the blanket coverage afforded by the protective order, the defendants did not pre-screen for relevancy or confidentiality much of the documentary material produced to MCI; nor did they seek rigidly to confine the depositions taken by MCI to relevant and proper lines of questioning.

In addition, while the jurisdictional issue was pending and discovery was stayed in *United States* v. *American Tel. & Tel. Co.,* other private antitrust actions against the Bell System were filed, and discovery com-

System sought review of this jurisdictional ruling both in this Court and in the Court of Appeals for the District of Columbia Circuit pursuant to petitions for a writ of certiorari. Discovery was once again stayed by the Court of Appeals, first, on its own motion, on February 3, 1977, pending disposition of the petition for certiorari pending before it (Order, February 3, 1977, *American Tel. & Tel. Co.* v. *United States,* D.C. Cir., No. 77-1009), and, subsequently, on petitioners' motion on August 11, 1977, pending disposition of a petition for writ of certiorari by this Court (Order, August 11, 1977, *American Tel. & Tel. Co.* v. *United States,* D.C. Cir., No. 77-1009). This Court ultimately denied review (434 U.S. 966 (1977)), and the final stay of "all proceedings" in the district court expired on November 28, 1977.

menced in those cases. In virtually every one of these cases, a protective order of some kind was entered which limited the use of documents subject to the order to the preparation and trial of that particular case. Among these cases was *Litton Systems, Inc.* v. *American Tel. & Tel. Co.*, No. 76 Civ. 2512 (S.D.N.Y.)—another case involving massive discovery requests by the plaintiff.[5]

The complaint in the *Litton* case was filed on June 7, 1976, and the protective order in that case was entered on December 20, 1976 (App. G). Discovery commenced shortly thereafter, and during the course of that discovery process, the Bell System produced some five million pages of documentary material, of which one million pages were copied by Litton. In addition, extensive deposition testimony was taken. Discovery is now also near completion in the *Litton* case.

The protective orders in these two cases have been a matter of public record throughout the periods involved. Nevertheless, the Government did not object to, or move to modify, either of the protective orders at the time it filed its own suit, or at any time during or soon after the discussions with defendants' counsel. Instead, it waited nearly three years—three years in

[5] The *Litton* case differs from the *MCI* case in that *MCI* involves an attack by a specialized common carrier principally focused upon the intercity services tariffs of the Bell System whereas *Litton* involves an attack by a terminal equipment manufacturer upon state tariffs and manufacturing and marketing practices of the Bell System companies. Hence, although involving considerable overlap insofar as discovery against the Bell System's top executives, the discovery request in *Litton* largely complemented the request in *MCI*, with heavy emphasis on document production from Western Electric, Bell Laboratories, and operating telephone companies with respect to matters with which *MCI* was not principally concerned.

which discovery by MCI and Litton against the Bell System proceeded to the point of virtual completion under the protective orders in those cases—and then announced a radical change in its entire approach to discovery. Rather than conducting independent discovery as it had originally stated its intention to do, the Government adopted a new strategy for preparing its case against the Bell System which consisted primarily of attempting to appropriate for its own use the fruits of discovery from the *MCI*, *Litton* and other private cases pending against the Bell System and which relegated any discovery to be obtained directly in the Government's own case in accordance with the Federal Rules of Civil Procedure to filling any remaining "evidentiary gaps" (Memorandum for the United States in Support of Motion to Permit Access to Pretrial Discovery, filed November 17, 1977, in *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, pp. 3-4). Moreover, the Government's new strategy went beyond the mere gaining of access to discovery materials in these cases and included an effort to obtain from plaintiffs' counsel any analyses or indices of the discovery materials which they might be willing to share with the Government, thus creating the possibility that the Government might be able to obtain—in fully organized form ready for presentation at trial—substantial parts of its case.[6]

[6] This new strategy became clear shortly before the stay of discovery was lifted in *United States* v. *American Tel. & Tel. Co.* when the Government appeared in both the *MCI* and *Litton* cases to request that the protective orders in those cases be modified to allow private counsel to turn over the discovery material in those cases to the Government and to cooperate with Government counsel, and when the Government, in a more recently filed case—*Wyly Corp.* v. *American Tel. & Tel. Co.*, Civil Action No. 76-1544

The purpose and effect of this new strategy of the Government were clear. If the Government could obtain access to broad discovery conducted by private parties during the period in which discovery had been stayed in *United States* v. *American Tel. & Tel. Co.*, it could effectively avoid the impact of those stays upon its trial preparations and put itself into a position as good as—if not better than—the position it would have been in had the stays not been entered. The defendants, however, had no such alternative open to them. No discovery against governmental agencies had been conducted prior to the expiration of the stays in *United States* v. *American Tel. & Tel. Co.*, either by the Bell System or by private plaintiffs in cases against the Bell System.[7] Even now, the only discovery the Bell System has been able to obtain against the Government is some limited discovery against the Department of Justice itself.[8]

In these circumstances, petitioners filed motions with the district court on November 28, 1977—the very day on which the stay of discovery in *United States* v. *American Tel. & Tel. Co.* expired—seeking to prohibit

(D.D.C.)—supported plaintiffs' motion for entry of a protective order which would have allowed plaintiffs to trade the documents they discovered in that case with other plaintiffs in pending cases against the Bell System, including specifically the Government.

[7] The Bell System defendants had sought discovery from the FCC in the fall of 1977 in the *MCI* case, but the FCC resisted this discovery, and the *MCI* court has not yet ruled on cross-motions to enforce or to quash the subpoena served in that case.

[8] The Government has refused even to respond to the document requests served by the defendants with respect to other governmental agencies. (Transcript of October 6, 1978, pp. 51, 57). A motion to compel production of the documents called for in those requests has been filed in the district court but has not yet been ruled upon.

the Government from further resort to extra-legal discovery processes to obtain the fruits of discovery conducted in other cases and to establish a phased discovery program in accordance with the Federal Rules of Civil Procedure and the Manual for Complex Litigation. The Government filed counter-motions, essentially asking the court to sanction and implement the new discovery approach that it had been pursuing. In these motions, the Government asked the district court to order the defendants to turn over their copies of all discovery materials generated in certain designated cases—including both documentary and deposition material—and to approve their efforts to obtain from plaintiffs' counsel in those cases access to any analyses or indices that they might be willing to make available (Motion of the United States, filed December 12, 1977). These motions eventually resulted in the district court's opinion and pretrial orders of September 11, 1978, as to which petitioners now seek review.

In Pretrial Order No. 11, the district court approved the linchpin of the Government's scheme of appropriating wholesale the fruits of discovery in the private cases as the Government's principal means of trial preparation. Pretrial Order No. 11 requires petitioners to turn over to the Government microfilm reels containing copies of all documents selected by plaintiffs from the Bell System's files in the *MCI* and *Litton* cases.[9] These reels contain approximately 2.5 million

[9] The Government originally sought access to documents in five other antitrust cases and three regulatory proceedings in which petitioners are or were involved (App. B, pp. 43a, 56a n.91). The district court's order did not approve governmental access to the discovery in these proceedings; however, in its opinion, the district court strongly indicated an intention ultimately to permit the Gov-

pages of material, distilled through the work product of the attorneys for the private plaintiffs from 12 million pages of documents produced by the Bell System. The order gives no recognition to petitioners' right to review these materials for relevancy and even requires the provisional production of documents which have been ruled to be privileged in the *MCI* and *Litton* cases.[10]

The order does not reach the deposition transcripts requested by the Government nor does it approve the Government's efforts to obtain the analyses and indices of private counsel. However, in its accompanying

ernment access to the fruits of discovery in these proceedings as well. Thus, the court stated (*id.*): "Should the government desire to press its request for documents produced in other private lawsuits or regulatory proceedings, it may do so by special application showing the precise circumstances which establish the appropriateness and necessity of ordering their production."

[10] In the opinion which accompanied the order (App. B), the district court reasoned that the Government was entitled to these materials because of its status as a party to this litigation. Thus, the district court concluded that "as a defendant in this litigation, AT&T's duty to produce is squarely resolved by Rules 26 and 34 . . . which provide for the production of relevant documents within a party's possession, custody and control" (*id.* at 45a-46a). The court specifically held that the fact that the microfilm reflects the work product of private counsel "make no difference under the Rules" (*id.* at 46a). The court also concluded that the documents produced by defendants in *MCI* and *Litton* would be "*a fortiori* . . . relevant here" because the Government's case would "subsume" the *MCI* and *Litton* cases (*id.* at 50a). Although it recognized that at least some of the documents produced would be irrelevant to this lawsuit, the court stated that it was "difficult to envision what prejudice could ensue" from the production of a handful of irrelevant documents (*id.* at 52a). The district court also rejected the defendants' contention that Pretrial Order No. 11 would place them at a discovery disadvantage vis-a-vis the Government (*id.* at 53a n.86).

opinion, the district court made it clear that it was not rejecting the Government's strategy in either of these aspects. With respect to the depositions, the district court denied the Government's request "without prejudice to a subsequent submission of an appropriately supported application" (App. B, p. 57a n.91). And although the court did not directly address the Government's request for approval of its plan to seek access to the analyses and indices of private counsel, it indicated that it does not regard petitioners as having any right whatever to object to the Government's obtaining access to the work product of counsel for other parties in other litigation (*id.* at 47a).

At the same time, the district court issued three additional orders governing discovery in the case. Pretrial Order No. 10 fixed the discovery obligations of the United States under Rule 34 in this action to include all "agencies, departments, and subdivisions of the Executive Branch of the United States government" but not the FCC or other independent regulatory agencies (App. B, p. 70a). Pretrial Order No. 12 established a plan for progressively limiting the scope of discovery in the case over an exceedingly short period ending with an absolute cut-off of all discovery in 18 months (App. B, pp. 75a-77a). During this period, petitioners are required to file a series of Statements of Contentions and Proof—including lists of witnesses and documentary evidence. The first of these statements is due on January 1, 1979, well prior to the receipt of any significant number of documents by petitioners or even the start of a deposition program, and the second statement, due only four months later, will substantially bind petitioners with respect to both contentions and prospective proofs. Thus, while the court's opinion with respect

to Pretrial Order No. 10 recognizes the importance of discovery from the Government (App. B, pp. 36a-37a), petitioners' ability to obtain and use this material is severely curtailed by Pretrial Order No. 12.[11]

Following the district court's decision and the entry of its pretrial orders on September 11, 1978, the Government renewed its requests in the *MCI* and *Litton* courts that the protective orders in those cases be modified so as to permit the Government full access to all discovery materials in those cases and to grant the Government the right freely to share the analyses and indices of plaintiffs' counsel in those cases (Letter of September 14, 1978, from K. Anderson, Esq. to Hon. John F. Grady; Letter of September 14, 1978, from K. Anderson, Esq. to Hon. William C. Conner). The defendants in those cases opposed these requests and, on October 2, 1978, petitioners filed with the district court in *United States* v. *American Tel. & Tel. Co.* their motion for reconsideration of Pretrial Order No. 11, as well as other aspects of the court's decision and orders of September 11, 1978.[12]

[11] The remaining order, Pretrial Order No. 13, appointed a magistrate to "supervise all pretrial discovery and adjudicate all discovery disputes" (App. B, p. 79a).

[12] Defendants also sought reconsideration of Pretrial Order No. 10 with respect to the exclusion of the FCC and independent regulatory agencies from the discovery obligations of the United States under Rule 34 on the ground that such exclusion was based on a misinterpretation of this Court's decision in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), and would unduly burden defendants' efforts to obtain essential discovery. And defendants sought reconsideration of the severe limitations imposed on the scope and time allowed for discovery in Pretrial Order No. 12, pointing out that that order imposed a highly restrictive "material" to the "issues" standard for discovery which is inconsistent with Rule 26(b). This latter problem was substantially alleviated by the liberal construction placed on Pretrial Order No. 12 by the district court in its opinion on reconsideration (App. C, p. 88a).

The *Litton* court has not yet acted on the Government's request for modification of the protective order in that case. However, on October 9, 1978, the *MCI* court granted the Government's request and held that "MCI may forthwith make available to the United States Department of Justice all discovery materials obtained in this case" and that "counsel for MCI may also cooperate with the Department of Justice by furnishing any explanatory material or information which would be helpful to an understanding of the items produced" (App. D, p. 95a). In reaching that decision, the *MCI* court simply brushed aside the possibility of prejudice arising from petitioners' reliance on the protective orders or the Government's representation that it would conduct its own discovery (*id.* at 93a). Relying heavily upon the decision of the district court here, the *MCI* court reasoned that since the Bell System had been ordered to produce from its own files "all of the documents it produced for MCI," no interference with Judge Greene's control over this case would arise from allowing the Government access to all the discovery materials, including documents, deposition transcripts, and exhibits referred to in the *MCI* depositions, as well as the indices and analyses of MCI's counsel (*id.* at 92a). Although it noted that the court in *United States* v. *American Tel. & Tel. Co.* had denied the Government's request for access to the deposition transcripts and documentary exhibits, the *MCI* court expressed its view that a "court should not only encourage the sharing of discovery in cases with common fact questions but order it on its own motion even where the parties do not suggest it" (*id.*), and it authorized MCI

to make such material available to the Government (*id.* at 95a).

On October 16, 1978, petitioner AT&T, together with the other Bell System defendants in the *MCI* case, filed an appeal from the order modifying the protective order in that case. Simultaneously, these companies filed their brief on appeal and a motion for a stay of the order involved pending appeal. The Government indicated its desire to file papers opposing that stay and, by order dated October 18, 1978, it was allowed to do so. However, the Court of Appeals for the Seventh Circuit stayed the effectiveness of the *MCI* court's order until November 6, 1978, and on November 6, 1978, upon consideration of the Government's opposition, stayed that order pending expedited consideration of the merits of the appeal.

Also on October 18, 1978, the district court in *United States* v. *American Tel. & Tel. Co.* denied petitioners' motion for reconsideration of its September 11, 1978, opinion and orders in this case (App. C). In a memorandum decision in which it relied heavily upon the October 9, 1978 decision of the *MCI* court and adopted certain findings of fact made by that court, the district court rejected petitioners' contentions that the protective orders in *MCI* and *Litton* and the Government's express representations that it had no interest in the discovery in those cases required vacation of Pretrial Order No. 11.

On October 25, 1978, petitioners filed a petition for writ of mandamus in the United States Court of Appeals for the District of Columbia Circuit seeking an order requiring the district court to vacate Pretrial Order No. 11. Simultaneously, petitioners filed a motion for a stay of the district court's Pretrial Order No. 11, pending disposition of the petition for mandamus. By order dated October 27, 1978, the Court of Appeals directed the Government to file a response to the petition for mandamus on November 9. However, on October 31, 1978, before this response was filed, the Court of Appeals (Bazelon, J. and Tamm, J.), acting in response to the Government's opposition to petitioners' motion for a stay, entered an order denying the petition for mandamus but staying the district court's order for 48 hours to permit an application for stay in this Court (App. A). By order dated November 2, 1978, Mr. Chief Justice Burger continued the stay of the Court of Appeals, required the Government to file a response to the motion for stay pending disposition of this petition for writ of certiorari by November 7, 1978, and indicated that the motion would be considered by the entire Court at its conference on November 10, 1978.

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED TO DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The question presented by the instant petition is one of unusual importance, not only from the standpoint of the need for lawful and fair procedures in *United States* v. *American Tel. & Tel. Co.*, but also from the standpoint of the administration of justice generally. The Antitrust Division of the Department of Justice and other government agencies involved in antitrust enforcement have been attempting for several years to change the established interpretation of, and practice under, the Federal Rules of Civil Procedure, so as to make it possible for these agencies to obtain access to discovery in private antitrust suits for use in their own investigations and litigation. At least twelve differ-

ent courts had considered various aspects of the fundamental question raised by this new governmental strategy before the decision of the district court in *United States* v. *American Tel. & Tel. Co.*, and each of those courts concluded that this strategy was improper and unlawful. *Data Digests, Inc.* v. *Standard & Poor's Corp.*, 57 F.R.D. 42 (S.D.N.Y. 1972); *In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases*, 18 Fed. R. Serv. 2d 1251 (N.D. Cal. 1974); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, No. C-71-1906-SW (N.D. Cal.) (Transcript, September 30, 1974); *GAF Corp.* v. *Eastman Kodak Co.*, 415 F. Supp. 129 (S.D.N.Y. 1976); *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 1978-1 Trade Cas. ¶ 61,961 (E.D. Pa. 1976); *Wyly Corp.* v. *American Tel. & Tel. Co.*, Civil Action No. 76-1544 (D.D.C.) (Order of July 20, 1978); *Alcoa* v. *United States Department of Justice*, 1978-1 Trade Cas. ¶ 61,824 (D.D.C. 1978); *Martindell* v. *International Tel. & Tel. Corp.*, 25 Fed. R. Serv. 2d 1283 (S.D.N.Y. 1978); *United States* v. *GAF Corp.*, 1978-1 Trade Cas. ¶ 62,015 (S.D. N.Y. 1978); *United States* v. *ARA Services, Inc.*, 1978-2 Trade Cas. ¶ 62,250 (E.D. Mo. 1978); *TV Signal Co. of Aberdeen* v. *American Tel. & Tel. Co.*, Civil Action No. 70-6N (D.S.D.) (Order of July 14, 1978); *In re Cement and Concrete Antitrust Litigation*, MDL Dkt. No. 296, Civ. 76-788A PHX CAM (D. Ariz.) (Order, June 1978).

The views of the courts with respect to the unlawfulness of this strategy were unequivocal. In one frequently cited case, *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 1978-1 Trade Cas. ¶ 61,961 (E.D. Pa. 1976), for example, Judge Higginbotham branded the Government's strategy as a distortion of the compulsory processes of the courts (*id.* at 74,069):

> "Here, the USITC seeks wholesale access to the fruits of plaintiffs' discovery. Clearly, if the instant actions had not been filed, plaintiffs Zenith and NUE, against whom the USITC is now proceeding, would never have acquired the documents the USITC is seeking. Just as clearly, *the proper discovery route for the USITC is to proceed directly against defendants, as if the instant action had never been filed. This Court will not be a party to a distortion of the purposes of its compulsory process.*" (Emphasis supplied.)[18]

In yet another case, *GAF Corp.* v. *Eastman Kodak Co.*, 415 F. Supp. 129 (S.D.N.Y. 1976), which is perhaps the leading case on the subject, Judge Frankel condemned the Government's new strategy as fraught with the "potential for oppression" (*id.* at 132):

> "Volunteered resources employed at large private expense are added to the authorized Government energies available against Kodak. That this particular defendant is a corporate giant (assailed by a plaintiff who is no pigmy) cannot obviate *the unease engendered by the alliance.* Congress, deciding authoritatively for all of us, has allocated resources to law enforcement, both civil and criminal. Sometimes it has given express encouragement to informants and other adjuncts . . . . It is

[18] Similarly, in a later phase of the same proceeding, *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 1978-1 Trade Cas. ¶ 62,019 (E.D. Pa. 1978), the court reached the same result when a private party sought to obtain discovery under the same circumstances, emphasizing that to allow a wholesale appropriation of the fruits of discovery from another proceeding would be nothing less than "an abuse of the discovery process" (*id.* at 74,367-68):

> "It is an abuse of the discovery process to order a defendant in the instant litigation to produce all documents which he had submitted in another case under the judicial imprimatur that those documents when submitted, were judicially protected as confidential."

quite another thing for a court to sanction, and thus to encourage, the use of private litigants' devices as reinforcements for federal prosecutors, whether civil or criminal. *The potential for oppression against enterprises large and small, or against individuals, is not rendered imaginary by our inability to forecast it with clarity.*" (Emphasis supplied.)

The district court here simply brushed these decisions aside. Apparently motivated by the belief that the long period during which discovery was stayed in this case requires and justifies unusual short-cut procedures that may make up some of the time lost,[14] the court condoned the Government's strategy without even attempting to deal with the considerations that had led other courts consistently to condemn that strategy.[15]

[14] The district court did not, in its opinion of September 11, 1978, rely upon the existence of these stays as a ground for its decision. However, in denying petitioners' motion for a stay in an order issued on October 27, 1978, the court made it plain that the effect of these stays were very much in the forefront of its consideration of the issue:

"(3) The public interest will not be served by the issuance of a stay pending the outcome of the application for writ of mandamus, the case having been under stay for almost three years of its four-year history, with a substantial portion of the stays being related to previous attempts to obtain extraordinary relief from interlocutory orders."

[15] The court distinguished *GAF* on the ground that "In *GAF*, the government was not engaging in the discovery process as a party to that or any other litigation involving GAF or Eastman Kodak" (App. B, p. 45a), without regard to the fact that such a distinction in no way satisfied Judge Frankel's reasoning, and without even acknowledging that in other cases in which the Government was involved in ongoing litigation with the party whose documents were sought, access was denied in decisions based in part upon reliance on *GAF*. See, *e.g.*, *Wyly Corp.* v. *American Tel. & Tel. Co.*, Civil Action No. 76-1544 (D.D.C.); *United States* v. *ARA Services, Inc.*, 1978-2 Trade Cas. ¶ 62,250 (E.D. Mo. 1978). Moreover, the distinction relied upon by the district court is patently unsound for it

Petitioners submit that there can be no doubt that this decision raises an important federal question that should be resolved by this Court. Indeed, the Government itself has publicly stated this view. Thus, when it was faced with a consistent line of decisions condemning its new strategy, the Antitrust Division announced its intention to take an appeal from one of these adverse decisions and, if that failed, to seek legislation from Congress:

". . . at some point in the right situation, and I don't think this [the *Zenith Radio* litigation] is it, but in the right situation, we will appeal one of those things. We will go in and try to break it, and appeal it, and, one hopes, win that way. If we do not win that way, then I think we have to go to Congress and get legislation."[16]

Moreover, when the ramifications of the Government's new strategy are considered, it is apparent that review by this Court is imperative, for that strategy would change the whole nature of discovery under the Federal rules and render important provisions of those Rules unworkable.

The purpose of discovery under the Federal Rules is to permit a party to prepare *its case* for trial through access to relevant documents and facts. Discovery is *not* a vehicle to sift through an opponent's files (and depose an opponent's employees) to collect documents

makes no sense whatever to give the Government access to material only after it files a suit. Such a rule could only stimulate unnecessary litigation, since it would permit private plaintiffs to entice the Government to file suits based upon inflated descriptions of the kind of evidence that would be available after suit was filed.

[16] Statement of John H. Shenefield, Assistant Attorney General, Antitrust Division, in BNA Antitrust & Trade Reg. Rptr., October 13, 1977, pp. A-2, A-6.

and determine facts for some purpose other than the action in which the discovery is taken.[17] This simple and indisputable principle has rarely, if ever, been questioned; indeed, it forms the foundation of the framework of pretrial discovery under the present Federal Rules of Civil Procedure and in modern litigation procedure generally.

The drastic liberalization of the scope of discovery which was one of the significant milestones in the development of modern civil procedure was intended to assure that all relevant facts for the trial of an action would be developed and to speed the process of pretrial discovery by reducing the number of disputes between litigants about discovery questions. The success of this liberalization of discovery is now established. Yet this liberalization of discovery could never have taken place—and, indeed, it would collapse today—if the general rule were that a party who was engaged

[17] The district courts have repeatedly stressed that "the purpose of discovery is 'to enable the parties to prepare for trial with respect to their own bona fide existing claims' " (*Milsen* v. *Southland Corp.*, 1972 Trade Cas. ¶ 73,865, at 91,629 (N.D. Ill. 1972)) and have entered protective orders to prevent parties from abusing discovery for the purpose of revealing discovered information for use in other actions. Thus, in *Milsen* the court entered a protective order because "plaintiffs' counsel has represented that she intends to reveal copies of such documents to other franchisees of defendants, including those who have another action pending against defendant Southland" (*id.*). Likewise, in *Wyly Corp.* v. *American Tel. & Tel. Co.*, Civil Action No. 76-1544 (D.D.C.) (order of July 20, 1978), the court limited discovery to use in the action despite the plaintiff's expressed desire, supported by the Government, to trade documents with the Government and other litigants; and in *Alcoa* v. *United States Department of Justice*, 1978-1 Trade Cas. ¶ 61,824 (D.D.C. 1978), the court granted Alcoa's request for a protective order prohibiting the Government from disclosing any document or information without the consent of Alcoa or the prior order of the Court.

in discovery from an adversary in one litigated matter could transmit that discovery, without limitation, to persons who are not parties, for *their* own use in *their* contemplated, threatened, or pending actions against the common adversary. Such a possibility would drastically change that common adversary's calculus of risks and benefits in deciding whether to cooperate in, or to resist, pretrial discovery on the enormous scale which the Federal Rules allow; for if a litigant believes that expeditious discovery from its files in one case will spawn a large number of additional cases in which the discovery previously obtained will create disadvantages to it in dealing with other unnamed, and possibly unknown adversaries, the litigant will drastically restrict its cooperation in discovery in the first case brought against it.

The Government's new strategy of seeking access to discovery in other litigation for use in its own investigations and litigation not only directly collides with the purpose of discovery under the Federal Rules but also would undercut—indeed, render virtually useless—protective orders issued under Rule 26 to enforce the purpose of the Rules. The district judges responsible for supervising and trying the vast explosion of complex litigation filed in the last decade have found it increasingly desirable and necessary to use protective orders as a means of expediting the conduct of pretrial discovery in the cases before them and of reducing the burden which discovery disputes would otherwise impose upon the courts.[18] Thus, protective orders govern-

[18] In this type of litigation the fundamental purpose of the Federal Rules—"to secure the just, speedy, and inexpensive determination of every action" (Federal Rule of Civil Procedure 1) —has been promoted by such orders. As expressed by one seasoned district judge (*In re Coordinated Pretrial Proceedings in Western*

ing the use of information learned in discovery have been employed in virtually every case discussed in this petition in order to conserve the time and energy of the court and to expedite pretrial proceedings.

If the Government's new strategy is permitted to succeed, protective orders simply will not be able to perform these functions. No party will be willing voluntarily to sacrifice its rights under the Federal Rules in reliance upon a protective order that can be broken at will by the Government. And the district courts will

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Liquid Asphalt Cases, 18 Fed. R. Serv. 2d 1251, 1252 (N.D. Cal. 1974)):

> "The purpose of this litigation is to determine whether the defendants are liable to the plaintiffs under the antitrust laws and, if so, in what amounts. That in itself is difficult enough. The protective order was issued so that I would be spared the duty of deciding applications for protective orders during the course of the discovery. Massive quantities of documents have been furnished by defendants under the umbrella of the protective order and I have been spared such problems."

The protective orders entered in litigation brought against the petitioners were designed to serve precisely these ends. The protective orders in *MCI* and *Litton* recognize that "the public interest in the prompt and orderly administration of justice requires that production of the voluminous documents and other discovery materials involved in the discovery requested in this case proceed as expeditiously as possible" (App. F, p. 103a; App. G, p. 108a) and establish "procedures . . . which will expedite the discovery process" (App. F, p. 103a; App. G, p. 108a). Moreover, a protective order entered by the district court below in *United States* v. *American Tel. & Tel. Co.* recognized that "the need for prompt and orderly discovery" required the establishment of a mechanism by which the United States and the Bell System could speed pretrial proceedings relating to the production of documents without waiving or relinquishing their rights to assert claims of privilege as to those documents (App. B, p. 53a). Indeed, the district court conceded the value of the protective order in the Government's case and even relied on that protective order as a basis for expediting the discovery and review of documents (App. B, p. 52a n.84).

not be able to rely upon protective orders as a justification for compelling the expedition of discovery under circumstances where a party's full rights cannot reasonably be protected.[19]

Thus, the consequences of the district court's order upon the administration of justice could well be devastating. Under the district court's order, regardless of any provisions of any protective order issued over the signature of a United States District Judge, and regardless of any representations made by counsel for the United States or any other litigant, a party facing massive document production in an antitrust or other complex case would have no way to protect its rights other than to produce not a single document, and to permit not a single deposition question, which exceeded in even the most minor respect the strictly constrained boundaries of relevance to the action. This in itself would drastically slow the discovery process and lead to delay and substantial additional expense in violation of the purpose of the Federal Rules of Civil Procedure. In addition, disputes as to the precise minimum boundaries of discovery would inevitably arise between experienced and competent counsel dedicated to preserving the rights of their clients, and these disputes would all uitimately have to be resolved by the district courts.

Moreover, the adverse consequences of the district court's order on the fair and orderly administration of

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[19] *Cf. Chamber of Commerce* v. *Legal Aid Society*, 423 U.S. 1309, 1312 (1975) (opinion in chambers), in which Mr. Justice Douglas relied upon a protective order as a factor eliminating the possibility of irreparable injury.

justice in the federal courts extends even beyond the severe impairment of the use of broad protective orders to expedite discovery in large and complex cases. By effectively circumventing the protective orders entered in the *MCI* and *Litton* cases, Pretrial Order No. 11 creates a situation which could impair the control of the district courts over discovery in many cases and subject litigants to the danger of having to obey conflicting orders from different courts.

Court orders governing the scope of discovery, the timing of discovery, and the terms and conditions of discovery could all be indirectly nullified through orders permitting litigants to share discovery materials from other cases.[20] Instead of an orderly and fair process in which the scope of discovery is determined by the subject matter in each case and the timing and procedures for discovery are controlled by the responsible courts, confusion and unfairness would result with the discovery rulings of any court being injected into remote proceedings and effectively circumventing the supervision of the court responsible for the case.[21] Indeed, under the procedures sanctioned by the district

[20] For example, Judge Greene's denial of the Government's motion in this case to compel the Bell System to produce the deposition transcripts and exhibits from the *MCI* case was directly undercut by the subsequent decision by the *MCI* district court which disregarded the limitations which Judge Greene had imposed and permitted MCI to make those same deposition transcripts and exhibits available to the Government. Similarly, if sharing is freely permitted, a discovery cut-off or subject matter limitation could be evaded by obtaining the desired materials through another litigant in another case against the same adversary.

[21] Although the *MCI* court relied upon the concept of multidistrict litigation as justifying and requiring its modification of the protective order in that case so as to permit sharing of the fruits

court, discovery materials obtained from the files of major corporations could become highly marketable commodities which would be bought and sold as prepackaged lawsuits.[22] In such circumstances, suits could, and doubtless would, be brought for the principal purpose of obtaining access to corporate files for subsequent sale and profit in other litigation and to encourage potential plaintiffs to bring additional litigation.

Finally, conflicts between various courts will be inevitable, as is illustrated by this very case. The documents which Pretrial Order No. 11 directs petitioners to produce to the Government were obtained by MCI

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of discovery, that concept bears little resemblance to the situation involved here. Sharing of discovery is permissible in a multidistrict context precisely because that whole process is subject to statutory controls specifically designed to assure fairness to the parties and control by the courts. Cases are not multidistricted unilaterally by one judge who believes there may be common fact questions, but only after the Judicial Panel on Multidistrict Litigation has made such a determination supported by findings of fact and conclusions of law and has also accorded the parties an opportunity by brief or hearing to demonstrate why, in the interests of justice, cases in which common fact questions do exist should nevertheless not be multidistricted (28 U.S.C. § 1407). Moreover, if the Panel determines that multidistrict litigation is appropriate, the cases are then transferred to one judge who controls discovery in all the cases and who can assure fairness to the parties. Document sharing in other contexts is nothing less than *ad hoc* multidistricting without any of these procedural safeguards.

[22] As the Court is doubtless aware, there is already an active trade in such materials based largely upon evidence developed at trial in large antitrust litigation. See, *e.g.*, *OnLine*, April/May 1977 (published by the Computer and Communications Industry Association), p. 8. If discovery materials are made freely available to those engaged in this trade, it will doubtless rapidly expand and substantially contribute to the flood of litigation already facing the courts.

and Litton under protective orders issued by the respective courts precluding the parties to those cases from disclosing those documents to anyone not involved in the preparation or trial of the respective cases. Petitioners are thus ordered to turn over to the Government a particular set of documents the very existence of which is a result of litigation in other courts and the disclosure of which by the party creating that set of documents is directly prohibited by orders entered by those courts. Since Pretrial Order No. 11 operates directly only upon petitioners' copies of these documents, and not upon copies in the possession of private plaintiffs, no direct conflict with existing protective orders is involved; but the purpose of the protective orders is unquestionably undercut. Hence, the currently effective orders of two different federal courts are plainly at cross purposes.[23]

Moreover, by effectively inviting the Government to expand its request to include "documents produced in other private lawsuits" in addition to *MCI* and *Litton* (App. B, p. 56a n.91), the court below created the prospect of a similar situation with respect to the outstanding orders of at least two other district courts which had previously rejected the very scheme sanctioned by Judge Greene in this proceeding. Thus, in *Wyly Corp.* v. *American Tel. & Tel. Co.*, Civil Action No. 76-1544

[23] The subsequent order of Judge Grady in the *MCI* case modifying the protective order in that case to permit the disclosure of the Bell System documents produced to and copied by MCI does not avoid this conflict of purpose, even as to those documents, since that order has been stayed by the Court of Appeals for the Seventh Circuit pending review. Moreover, Judge Greene specifically stated in his October 18, 1978 opinion on reconsideration that Pretrial Order No. 11 was in no way conditioned upon the consent of the courts involved in *MCI* and *Litton* (App. C, p. 87a n.8).

(D.D.C.), another pending antitrust case in which AT&T is the defendant, Judge Gasch entered a protective order, *over the objection of both Wyly and the Department of Justice,* appearing as *amicus curiae,* which specifically precludes the sharing of the fruits of discovery by Wyly with the Government and restricts the use of all discovery materials in that case to "the preparation or trial of this action" (Order dated July 20, 1978). Similarly, in *TV Signal Co. of Aberdeen* v. *American Tel. & Tel. Co.,* Civil Action No. 70-6N (D.S.D.), the court entered an order after trial specifically prohibiting the plaintiff from turning over discovery material obtained in the course of that litigation to the Department of Justice (Order dated July 14, 1978).

The approach adopted by the district court in Pretrial Order No. 11 threatens both of these protective orders. If Pretrial Order No. 11 is extended to the *Wyly* and *TV Signal* cases—and, under the district court's reasoning, there is certainly no basis for believing that it will not be—petitioners will be in a position of having to produce to the Government their copies of sets of documents which the courts in *Wyly* and *TV Signal* have expressly found the Government is not entitled to obtain.[24] Such circumvention of the lawful orders of other federal district court judges, with its attendant

[24] The protective orders in *Wyly* and *TV Signal*, like those in *MCI* and *Litton*, apply only to the particular sets of documents selected for copying by the plaintiffs in those cases and do not in any way impair the right of the Government to obtain, through an appropriate request, copies of any document in petitioners' possession that may happen to be among those sets of documents. There is thus no basis for the district court's assertion that adoption of petitioners' position would mean they would be "immunized" from making full discovery available to the Government or that "meaningful discovery from defendants in this case must await the day" when all of the other pending actions—including

playing off of one court against another,[25] cannot be tolerated if cases are to proceed smoothly through the courts in which they are filed.

II. THE WRIT SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS SANCTIONED A DEPARTURE BY THE DISTRICT COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS OF A NATURE THAT WOULD DENY PETITIONERS A FAIR OPPORTUNITY TO DEFEND THEMSELVES AND THUS CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

In addition to the principles and considerations discussed above, this Court should grant the instant petition in order to consider the impact of the district

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MCI and *Litton*—are concluded (App. C, p. 86a). Petitioners do not contend—and have not contended—that the existence of a protective order in one case in any way precludes production of the same documents in another pending case. Thus, the Government can obtain all of the documents to which it is entitled under Rules 26 and 34 of the Federal Rules, whether or not some of those documents have previously been produced to MCI, Litton or anyone else. Although the district court's memorandum on reconsideration is permeated with confusion on this point, that court was plainly aware in its September 11 opinion that petitioners were not resisting their obligation to produce the documents produced to MCI and Litton. Thus, in that opinion, the court asserted that "defendants here do not . . . dispute that in the normal course of discovery in this litigation the government would be entitled to production of . . . documents . . . produced in the *Litton* and *MCI* lawsuits" and took the position that it would "defeat the purpose of the Rules to require plaintiff in this case to proceed laboriously, and possibly at the cost of several years' delay, to duplicate the document selection process conducted by the plaintiffs in *Litton* and *MCI* when the fruits of that process are readily available . . . ." (App. B, p. 48a).

[25] Such a process is inherent in the Government's strategy, as is evident from this case. Before the district court in this case, the Government claimed it was only seeking "documents (or microfilm copies of documents) produced by AT&T to the private plaintiffs, and selected for use by the private plaintiffs" (App. B, p.

court's order on petitioners' ability to prepare a defense in this case. If Pretrial Order No. 11 is permitted to take effect, the Bell System's right to reciprocal and equivalent discovery—and thus its ability to prepare an adequate defense to the Government's charges—will be severely prejudiced.

The microfilm reels that would be produced under Pretrial Order No. 11 reflect the product of considerable effort by counsel for MCI and Litton during the same period in which petitioners' counsel were prevented from engaging in discovery in *United States* v. *American Tel. & Tel. Co.* by virtue of the stays that were entered in that case. The 2.5 million pages of documentary material contained on those reels were selected over a long period of time by a large number of lawyers and supporting personnel from more than 12 million pages of material produced in response to document requests in those cases. Moreover, the microfilm reels also inevitably reflect some organization of the materials involved—again, work done by, or under the supervision of, lawyers representing MCI and Litton at a time when petitioners' counsel were prevented from engaging in discovery against the Government.

43a). Before the *MCI* court, on the other hand, the Government sought access to all discovery materials in the possession of MCI, including deposition transcripts and exhibits and the right to full cooperation with MCI's counsel, and argued that the action of the district court here in granting it access to such documents required such a result (Letter from K. Anderson, Esq. to Judge Grady, dated September 14, 1978). Two days after the *MCI* court's order granting such access was stayed by the Court of Appeals for the Seventh Circuit on October 18, 1978, however, the Government returned to the district court in this case for an order under Rule 37 compelling production by the Bell System of the very deposition transcripts and exhibits which had been excluded from the scope of Pretrial Order No. 11 and to which access had been blocked by the Seventh Circuit's stay.

If the Government is allowed to obtain all of the documents produced to plaintiffs in the *Litton* and *MCI* cases, it—and it alone—will avoid the impact of the stays of discovery entered in *United States* v. *American Tel. & Tel. Co.* Thus, the Government will be permitted access to the organized product of more than four years of discovery before petitioners are allowed effectively even to begin their discovery. This advantage violates the principle of reciprocal and orderly discovery adopted in the 1970 amendments to the Federal Rules—amendments which sought to eliminate the tactical advantage created by the priority practice that was prevalent before 1970 and which the district court has in effect resurrected by its order.[26] Moreover, in light

[26] The Federal Rules of Civil Procedure were amended in 1970 to eliminate the prior common practice of giving "priority" to the party who first initiated discovery and to substitute therefor a provision allowing discovery by both sides to proceed concurrently. The Advisory Committee found the priority practice to be "unsatisfactory and unfair in its operation," and stated that the better practice was the one in effect in some jurisdictions where arrangements were typically made for alternation in the taking of depositions. Proposed Amendments to the Federal Rules of Civil Procedure, 48 F.R.D. 487, 507 (1970). As an example of the practice of which it approved, the Committee cited *Caldwell-Clements, Inc.* v. *McGraw-Hill Pub. Co.*, 11 F.R.D. 156, 158 (S.D.N.Y. 1951), a case in which the court rejected the priority rule:

> "*This Court does not believe that any of the litigants should be rendered sterile with the necessary preparation of its case while the other party is conducting its examination,* simply because one got the jump on the other in serving notice, *especially so, where the other* under the Rules *was in no position to make a similar move.* The Court is of the opinion that the interests of justice will be served in the present situation if the examinations proceed apace under the following provision for alternate examination periods." (Emphasis supplied.)

Similarly, the Manual for Complex Litigation provides that all parties should "proceed simultaneously with discovery" (§ 0.50) since "any other course . . . may prejudice the party first to make

of the pretrial program established by the district court's Pretrial Order No. 12, the Government's four-year advantage in the discovery in this case constitutes a threat to petitioners' right to a fair trial. See *Wardius* v. *Oregon*, 412 U.S. 470 (1973).[27]

Pretrial Order No. 12 imposes an 18-month limitation upon discovery in *United States* v. *American Tel. & Tel. Co.*, a discovery cut-off which establishes what the Government itself concedes is an exceedingly tight schedule. Consequently, Pretrial Order No. 11, and even more so the *MCI* court's order allowing the Government access to all of the discovery materials in *MCI* and analyses of those materials by MCI's lawyers, affords the Government an effective period of discovery far longer than petitioners will ever be afforded. Moreover, in plain disregard of the broad discovery which the Government has had for a substantial period,[28] Pretrial Order No. 12 severely limits the scope

discovery or the party whose discovery is deferred" (*id.*). These precepts have been widely followed by the courts in large antitrust cases. See, *e.g.*, *Control Data Corp.* v. *International Business Machines Corp.*, 306 F. Supp. 839, 849 (D. Minn. 1969).

[27] In *Wardius* v. *Oregon*, a criminal case involving a state "notice-of-alibi" rule, this Court pointed out that the "Due Process Clause . . . does speak to the balance of forces between the accused and his accuser" and held that "in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street" (412 U.S. at 474-75). Subsequently, in *Exxon Corp.* v. *FTC*, 411 F. Supp. 1362 (D. Del. 1976), the court, while not deciding whether *Wardius* applies in civil proceedings, construed the holding in that case as requiring "reciprocal discovery" on grounds of "fundamental fairness" (*id.* at 1371).

[28] In addition to the four-year priority provided by Pretrial Order No. 11, the Government has had the benefit of extensive requests for documents served on the Bell System under its civil investigative demand authority. These requests covered materials

of petitioners' discovery.[29] Finally, Pretrial Order No. 12 virtually compels petitioners to begin restricting their defenses, and the evidence in support of those defenses, for use at the trial of this case at the outset of discovery [30]—an extraordinary plan consistent with the Government's present posture after years of investigatory discovery, supplemented, as it now develops, by more than four years of active discovery conducted on its behalf by private plaintiffs in other lawsuits against the petitioners, but one which was adopted by the district court without any consideration of petitioners' inability even to commence discovery in this lawsuit.

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dating back to the early 1960's and many thousands of pages of material were produced by the Bell System in response (see Memorandum for the United States in Support of Motion to Permit Access to Pretrial Discovery, filed in the *MCI* case on November 17, 1977, p. 3).

[29] Prior to its effective modification on reconsideration, Pretrial Order No. 12 limited discovery almost completely to evidence admissible at trial. Even after clarification on reconsideration, however, the order severely limits allowable discovery.

[30] Pretrial Order No. 12 requires the parties to file four successive Statements of Contentions and Proof, each to become progressively more specific than the last, with the final statement required to be a definitive presentation of all of the evidence to be presented at trial. Petitioners must submit their first two statements well prior either to the start of a deposition program or to the receipt of any substantial number of documents by the petitioners from the Government, and, under the terms of Pretrial Order No. 12, those submissions will substantially bind petitioners with respect to both contentions and prospective proofs (App. B, p. 77a). Moreover, Pretrial Order No. 12 is designed to restrict discovery as each Statement is filed, thus compounding the restrictions on petitioners' discovery and effectively limiting many aspects of that discovery to substantially less than the overall 18-month discovery period.

The district court's only attempt to deal with this serious prejudice to petitioners—prejudice inherent in its orders—was its unsupported assertion that petitioners would suffer no discovery disadvantage due to the Government's access to the documents in *MCI* and *Litton* because they have had corresponding discovery in those cases (App. B, p. 53a n. 86). Nothing could be further from the fact. Discovery by petitioners in the *MCI* and *Litton* cases focused almost exclusively upon the businesses of MCI and Litton and the causes of their alleged damages during relatively limited time frames—material which has little relevance to the issues raised by the Government's complaint, which relate to industry-wide conduct over more than thirty years and to the central role of the Government in the conduct being attacked.

Indeed, in the principal area of evidentiary overlap between the Government's complaint and the complaints in *MCI* and *Litton*—the role of the Government in the conduct which forms the basis for claims of both the Government and the private plaintiffs—petitioners have obtained no discovery whatever. Thus, to date the Bell System has been unable to obtain, in either the *MCI* or *Litton* cases, discovery from the Federal Communications Commission, the very discovery which is most essential to petitioners' defense in the Government's case. In contrast, the discovery which the Government would receive under Pretrial Order No. 11 was broadly based, and that part of it which is relevant at all relates directly to the issues raised by the Government in the present case—petitioners' policies and practices with respect to terminal equipment and intercity telecommunications services.

In these circumstances, the prejudicial impact of Pretrial Order No. 11 is clear. Moreover, the prejudice engendered by that order in this case is not uniquely the product of the particular pretrial orders entered by the district court. Rather, it is the consequence of the policy underlying Pretrial Order No. 11 of freely circumventing protective orders. Thus, the prejudicial impact of that policy in this case demonstrates in bold relief the utter unlawfulness of the new litigation strategy for which the Government has sought and received approval from the court below and provides this Court with an ideal case in which to review that strategy.

CONCLUSION

In view of the wholly unprecedented nature of the district court's order, the seriously disruptive consequences of that order to the administration of justice under the Federal Rules of Civil Procedure, and the impact of the order upon the ability of petitioners to defend themselves against the charges involved in *United States* v. *American Tel. & Tel. Co.*, the petition for certiorari should be granted.

Respectfully submitted,

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November 7, 1978

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

No. 78-2050

IN RE:

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; AND BELL TELEPHONE LABORATORIES, INC., *Petitioners*

Civil Action 74-1698

BEFORE: BAZELON and TAMM, *Circuit Judges*

Order

(Filed October 31, 1978)

On consideration of petitioners' petition for *writ of mandamus,* of petitioners' motion for stay pending disposition of petition for *mandamus*, and of the response filed to the motion for stay, it is

ORDERED by the Court that the petition for *writ of mandamus* is denied. It is

FURTHER ORDERED by the Court that petitioners' motion for stay is granted for a period of forty-eight (48) hours from the time this order is filed on condition that counsel submit an appropriate application for relief to the Supreme Court of the United States.

Per Curiam

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1698

UNITED STATES OF AMERICA, *Plaintiff*,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY; WESTERN ELECTRIC CO., INC.; BELL TELEPHONE LABORATORIES, INC., *Defendants.*

Opinion

(Filed September 11, 1978)

The motions before the Court address the Court's jurisdiction and they raise fundamental issues concerning the discovery that should govern the future path of this antitrust litigation. A recapitulation of the history of this case will be helpful to an understanding of these issues.

The complaint was filed on November 20, 1974. It alleges violations of Section 2 of the Sherman Act, 15 U.S.C. § 2, by the American Telephone and Telegraph Company (AT&T),[1] Western Electric Company, Inc. (Western Electric),[2] and Bell Telephone Laboratories, Inc. (Bell Labs).[3] In sweeping language the complaint alleges that an unlawful combination and conspiracy exists and has existed for many years among the defendants and certain co-conspirators (primarily the Bell Operating Companies),[4] designed to permit AT&T to maintain control over Western Electric, Bell Labs, and the Bell Operating Companies; to restrict competition from other telecommunications[5] systems and carriers and from other manufacturers and suppliers of telecommunications equipment; and to cause Western Electric to supply substantially all the telecommunications requirements of the Bell System.

The complaint explains that the defendants are violating the antitrust laws by various monopolistic practices, including the refusal to sell terminal equipment to subscribers of Bell System telecommunications service, the creation of obstructions to the interconnection of various carriers with the Bell System, and the maintenance of a monopolistic manufacturing and purchasing relationship between Western Electric and the Bell System. It is further alleged that,

[1] According to the government, AT&T is organized under the laws of the State of New York, with the stock of Western Electric, fifty per cent of the stock of Bell Labs, and all or part of the stock of the 23 Bell Operating Companies as its principal assets. It is divided operationally into two major divisions: Long Lines and the General Departments. Long Lines, which has a certificate of convenience and necessity from the Federal Communications Commission, provides interstate telephone service, and files tariffs with the Commission governing the terms, rates, and conditions of its service. The General Departments provide AT&T, Western Electric, Bell Labs, and the Bell Operating Companies with various kinds of advice and assistance. The General Departments have no federal or state certificates of public convenience and they file no tariffs.

[2] Western Electric is the 12th largest individual corporation in the United States, with sales of over $7 billion. It owns fifty per cent of the stock of Bell Labs, and it has at least one wholly owned subsidiary. It is not regulated by any federal or state regulatory authority. See pp. 12-14, *infra*.

[3] Bell Labs is owned in equal parts by AT&T and Western Electric. It conducts research and development, primarily for AT&T, Western Electric, and Bell Operating Companies. Like Western Electric, it is not regulated by any federal or state regulatory authority. See pp. 12-14, *infra*.

[4] There are 23 Bell Operating Companies which, along with many other non-Bell companies, provide primarily intrastate, and some interstate service, pursuant to certificates of public convenience and necessity.

[5] Telecommunications is defined as the electronic and electromagnetic transmission of voice, data, and other communications by wire, cable, microwave radio, and communications satellite.

as a consequence of these practices (1) defendants have achieved and are maintaining a monopoly of telecommunications service and equipment; (2) competition in these areas has been restrained; and (3) purchasers of telecommunications service and equipment have been denied the benefits of a free and competitive market. Among other relief, the action seeks the divestiture by AT&T of all Western Electric stock; the separation of some or all of the Long Lines Department of AT&T from the Bell Operating Companies; the divestiture by Western Electric of its manufacturing and other assets sufficient to insure competition in the manufacture and sales of telecommunications equipment; and such relief against Bell Labs as the Court may find appropriate.

Defendants' Answer, and the Court *sua sponte*, raised two threshold defenses: (1) that a decree entered in 1956 by the U.S. District Court for the District of New Jersey (*United States* v. *Western Electric Co.*, Civil Action No. 17-49 (D.N.J. 1956)) is *res judicata*, and (2) that the matters complained of by the government are within the exclusive jurisdiction of the Federal Communications Commission and therefore immune from scrutiny under the antitrust laws. On October 1, 1976, the Court rejected the claim of *res judicata*, and on November 24, 1976, it ruled that defendants do not possess blanket immunity from antitrust liability by virtue of the Communications Act of 1934 or their regulation by the Federal Communications Commission. In rejecting the plea that the FCC has exclusive jurisdiction over the subject matter of this litigation, the Court further stated, however, that it might in the future refer particular issues to the Commission under the so-called doctrine of primary jurisdiction. *United States* v. *Am. Tel. & Tel. Co.*, 427 F. Supp. 57 (D.D.C. 1976, Waddy, J.), *cert. denied*, 429 U.S. 1071 (1977), *cert. denied*, No. 77-1009 (D.C. Cir. May 27, 1977), *cert. denied*, 434 U.S. 977 (1977).

Shortly after the filing of the complaint, in November of 1974, and while these legal issues were being litigated,

the parties began to engage in discovery.[6] Defendants served a request for production of documents upon the government, as well as a comprehensive set of interrogatories. The government, for its part, filed numerous discovery requests upon defendants and each of the operating telephone companies in which AT&T holds a majority interest, and it began fairly extensive third party discovery. Disputes arose almost immediately, however, with each side accusing the other of making unduly broad requests and of engaging in obstructive conduct in relation to opposing requests.

These controversies became moot in relatively short order, as the course of discovery was stayed pending resolution of the jurisdictional issues.[7] Eventually, and contemporaneously with its ruling on these issues, the Court issued an order vacating the stay that had been in effect for almost 22 months,[8] and shortly thereafter, pursuant to stipulation of the parties, it issued a number of other pretrial orders, which established machinery for the recommence-

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[6] As early as 1973, prior to the institution of this action, the government had issued an extensive civil investigative demand, and the Bell System in fact produced documents pursuant to that demand. In addition, according to an attachment to plaintiff's response to defendants' first set of interrogatories, the Justice Department had a number of interviews and contacts with potential witnesses prior to the filing of the complaint.

[7] For that reason, the Court did not become extensively involved with discovery at that time, and it issued only one order which dealt expressly with the discovery process. That order (Pretrial Order No. 1) in essence preserved the status quo with respect to the existence of documents, by requiring plaintiff to retain and secure from destruction all documents requested by defendants from over forty government agencies, and by compelling defendant to retain and secure from destruction all its files which might be relevant to this action.

[8] Pretrial Order No. 4.

ment of discovery.[9] Almost immediately upon the entry of these orders, defendants sought review of the Court's ruling on the jurisdictional issues by petitioning both the U.S. Court of Appeals and the U.S. Supreme Court for writs of certiorari,[10] and during the pendency of these petitions in the appellate courts, all proceedings in this Court, including discovery, were again stayed, this time, with one brief interruption, from January 25, 1977, to November 28, 1977.[11]

When the last certiorari petition was denied, and the stays were dissolved, the parties filed a number of proposed orders concerning pretrial discovery,[12] and the Court,

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[9] Pretrial Orders 5-8, *inter alia*, fixed certain dates for the filing of interrogatories; set up voluntary procedures governing the production of documents by the parties pursuant to Rule 34 and for Rule 45 discovery relating to non-parties; required discovery requests to be specific; established an explicit definition of "protected" documents and a comprehensive scheme for treatment of such documents, including the appointment of a special master to pass on claims of privilege; and provided that the voluntary Rule 34 discovery procedures were revocable by any party upon fifteen days' notice to the other party. In addition, on that date, the Court issued a "Stipulation and Order Concerning Documents in the Possession, Custody, or Control of Agencies other than the Department of Justice." This document set up a procedure for the voluntary production of documents from those agencies to defendants.

[10] Jurisdiction was claimed under the All Writs Act, 28 U.S.C. § 1651, but, as noted *supra*, both courts ultimately declined to entertain defendants' petitions.

[11] The U.S. Court of Appeals issued two stays of the proceedings. On January 25, 1977, it entered a stay on its own motion until the matters raised in defendants' petition could be adequately briefed and ruled upon, and on August 11, 1977, it entered a stay on defendants' motion for the period required to seek certiorari in the Supreme Court.

[12] Plaintiff and defendants each submitted five proposed pretrial orders.

by its order of February 7, 1978, referred the case to Magistrate Lawrence S. Margolis to direct the preparation of a discovery schedule (see p. 55, *infra*). At the same time, it denied two pretrial orders (Nos. 9 and 12) submitted by defendants which again raised the issue of the Court's jurisdiction; denied proposals for pretrial orders (Nos. 10 and 11) which would have dealt in various ways with documents generated in private antitrust proceedings in which AT&T is a defendant; and referred to the Magistrate defendants' proposed Pretrial Order No. 13 which would have established that all agencies and departments of the United States government are party plaintiffs in this suit for purposes of discovery. All of these matters, which are still pending, are discussed in detail below.

Pursuant to the authority vested in him by the Court, Magistrate Margolis on April 27, 1978, issued two discovery orders.[13] Defendants objected to the second of these orders, and appealed it to the Court (28 U.S.C. § 636(b)(1)(A)) which approved a provision establishing a mechanism for the voluntary production of documents from government agencies, but otherwise stayed the effect of the order.[14]

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[13] Discovery Order No. 1 ordered defendants to produce documents requested by the government on February 3, 1977, after the first Court of Appeals stay had been entered, and also ordered the Justice Department to commence production of documents from its own files. Discovery Order No. 2 established explicit procedures for discovery of documents generated in private antitrust suits in which AT&T was a defendant as well as in federal and state regulatory proceedings involving defendants, and it set up procedures for voluntary discovery by AT&T from government agencies other than the Justice Department. The order also provided for a comprehensive discovery schedule, including the setting of dates for preliminary orders of proof and for termination of discovery.

[14] The Court also consolidated the issue concerning defendants' proposed Pretrial Order No. 13 with the appeal from the Magistrate's Discovery Order No. 2 for purposes of disposition.

Since that time, there has been little activity,[15] and such discovery as has been attempted has been the subject of intense controversy.

The case was assigned to this Court on June 22, 1978. On July 6, 1978, the parties were directed to file status memoranda on all outstanding issues, and on August 21, 1978, argument was heard on these matters.[16] While these issues arose in varying procedural contexts, they may conveniently be discussed under four headings: (1) jurisdiction, (2) the nature of the plaintiff, (3) the government's effort to secure access to documents collected in several private antitrust suits brought against defendants in other districts, and (4) the future course of this action, including the scheduling of proceedings and the authority of the Magistrate and the Special Masters.

I

In all of their submissions to this Court, defendants have vigorously and consistently raised the jurisdictional issue.

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[15] However, on June 29, 1978, the Court, acting pursuant to Rule 53, F.R.Civ.P., and the still viable Pretrial Order No. 7 to which the parties had stipulated, appointed Professors Paul Rice of American University and Geoffrey Hazard of Yale University as Special Masters to deal with claims of privilege in the discovery process. The order of reference charged the Special Masters with making "findings of fact and conclusions of law with respect to the matters presented to them by the parties and report expeditiously to the court pursuant to Rule 53(e) . . . ;" permitted them to make all arrangements necessary to accomplish those duties; provided that the decisions of the Special Masters would be subject to review *de novo* by the Court upon timely application of the parties, and directed that any matter upon which the Special Masters could not agree would be submitted to the Court for resolution.

[16] Because of the illness and death of Judge Joseph C. Waddy, to whom the case had originally been assigned, several motions were reargued to this Court.

They insist that an irreconcilable conflict exists between the antitrust laws and the regulatory scheme established by the relevant statutes,[17] that when there is such a conflict the antitrust laws must give way, and that therefore the Court lacks jurisdiction over this action. While in many respects defendants' contentions constitute rearguments of matters rejected by Judge Waddy in his order of November 24, 1976, in view of the importance of this issue, and since a claim of lack of jurisdiction may be raised and entertained at any time (Rule 12(h)(3), F.R.Civ.P.), I have independently considered the jurisdictional issues. Upon such reconsideration, I concur with Judge Waddy's conclusion that regulation by the Federal Communications Commission and state regulatory bodies does not immunize defendants from this antitrust action.

Telecommunications carriers clearly do not enjoy an express statutory immunity from antitrust enforcement with respect to the activities here involved. While Congress has not hesitated in so many words to exempt the practices of other industries from the antitrust laws,[18] and while it has statutorily exempted some activities of telephone companies from those laws,[19] it has not done so with respect to the conduct which is the subject matter of this complaint. Likewise, defendants have cited nothing in the legislative history of the statutes regulating the telecommunications industry which would lead to the conclusion that an antitrust immunity was contemplated when those statutes were en-

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[17] Principally the Communications Act of 1934, 47 U.S.C. § 151, et seq.

[18] *E.g.*, insurance (McCarran-Ferguson Act, 15 U.S.C. § 1012); air transportation (Federal Aviation Act, 49 U.S.C. § 1384); export trade associations (Webb-Pomerene Act, 15 U.S.C. § 62); surface transportation (Reed-Bulwinkle Act of 1948, 49 U.S.C. § 56(9)).

[19] 47 U.S.C. §§ 221(a) and 222(c)(1) exempt certain FCC-approved consolidations and mergers of telephone companies.

acted. Thus, if the Court lacks jurisdiction, it could only be because defendants enjoy an immunity by implication, resulting from an incompatibility between the antitrust laws and the statutes which regulate the telecommunications industry.

The problem created by the tension between the antitrust laws and economic regulation has been long recognized. See, *e.g., United States* v. *Trans-Missouri Freight Association,* 166 U.S. 290 (1879); 2 A. Kahn, *The Economics of Regulation: Principles and Institutions* 1, 4-5 (1971). Broadly speaking the antitrust laws are rooted in the proposition that the public interest is best protected by competition, free from artificial restraints such as price-fixing and monopoly.[20] The theory of regulation, on the other hand, presupposes that with respect to certain areas of economic activity the judgment of expert agencies may produce results superior to those of the marketplace,[21] and that for this reason competition in a particular industry will not necessarily serve the public interest.[22] Because of these divergent objectives, it could be, and has been, argued that whenever the Congress has established a scheme of regulation through an independent commission, it must be deemed

[20] The antitrust laws are a "comprehensive charter of economic liberty" (*Northern Pac. R. Co.* v. *United States,* 356 U.S. 1, 4 (1958)) whose goals have been described in many ways, from the advancement of consumer welfare (Bork, *The Antitrust Paradox* (1978), pp. 50-66) to the more radical objective of the diffusion of power in economic decision-making (A. Neale, *The Antitrust Laws of the USA* (2d ed. 1970), pp. 427-432; and Mr. Justice Douglas' dissent in *United States* v. *Columbia Steel Co.,* 334 U.S. 495, 536 (1948). See also, P. Areeda and D. Turner, Antitrust Law, vol. 1, par. 103, et seq. (1978).

[21] However, regulatory agencies sometimes seek to achieve their objectives, at least in part, through the fostering of competition.

[22] This may be so because the market is one of natural monopoly, in that it is incapable effectively to support more than one firm, or because of other economic, public policy, or political reasons.

to have determined that the antitrust laws should not apply to the industry thus being regulated. That, however, is not the law.

The Supreme Court has repeatedly noted that "repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *Otter Tail Power Co.* v. *United States,* 410 U.S. 366, 373 (1973), quoting *United States* v. *Philadelphia National Bank,* 374 U.S. 321 (1963). Accord, *Federal Maritime Commission* v. *Seatrain Lines, Inc.,* 411 U.S. 726, 733 (1973); *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware,* 414 U.S. 117, 126 (1973); *Carnation Co.* v. *Pacific Westbound Conference, et al.,* 383 U.S. 213, 217-8 (1966); *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357-8 (1963); *United States* v. *Borden Co.,* 308 U.S. 188, 198-9 (1939).

Regulated industries "are not per se exempt from the Sherman Act" (*Georgia* v. *Pennsylvania R. R. Co.,* 324 U.S. 439, 456 (1945)),[23] and they are not necessarily exempt even if the conduct complained of in an antitrust context has been expressly approved by the agency charged with regulating the particular industry.

In *United States* v. *Radio Corporation of America,* 358 U.S. 334 (1959), a decision by the Federal Communications Commission specifically approving an exchange of television stations was asserted as a defense to an anti-

[23] The antitrust laws apply notwithstanding regulation in such industries as the production of natural gas (*California* v. *Federal Power Commission,* 369 U.S. 482 (1962)); generation and transmission of electric power (*Otter Tail Power Co.* v. *United States, supra*); national banking (*United States* v. *Philadelphia National Bank, supra*); securities and commodities exchanges (*Silver* v. *New York Stock Exchange, supra; Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289 (1973)); and broadcasting (*United States* v. *Radio Corporation of America,* 358 U.S. 334 (1959)).

trust divestiture action. The Supreme Court rejected that contention, holding, as Mr. Justice Harlan expressed it in his concurring summary of the Court's decision (358 U.S. at 353), "a Commission determination of 'public interest, convenience, and necessity' cannot either constitute a binding adjudication upon any antitrust issues that may be involved in the Commission's proceeding or serve to exempt a licensee pro tanto from the antitrust laws. . . ." [24] See also *California* v. *Federal Power Commission*, 369 U.S. 482 (1962); *United States* v. *Philadelphia National Bank, supra; Otter Tail Power Co.* v. *United States, supra.*[25]

These principles have been applied to the area of jurisdiction of the Federal Communications Commission *(United States* v. *Radio Corporation of America, supra)* and to telephone companies specifically. *E.g., Industrial Communications Systems, Inc.* v. *Pacific Tel. & Tel.*, 505 F.2d 152, 156 (9th Cir. 1974); *International Tel. & Tel.* v.

[24] If the law were otherwise, the specific statutory immunity granted, for example, to telephone companies with respect to certain FCC-approved mergers (see Note 19, *supra*), would be redundant and unnecessary. See *Wilderness Society* v. *Morton*, 156 U.S. App. D.C. 121, 479 F.2d 842, 856 (1973), *cert. denied*, 411 U.S. 917 (1973); *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974).

[25] *Otter Tail* involved a District Court decree which required an electric power utility company to remedy its antitrust violations by establishing certain power interconnections. In response to the company's argument that by reason of the Federal Power Act it was not subject to the antitrust laws, the Supreme Court stated that, absent a direct conflict between the federal judicial decree and an order of the Federal Power Commission concerning specific interconnections, antitrust jurisdiction was not ousted. "It will be time enough to consider whether the antitrust remedy may override the power of the [Federal Power] Commission under § 202(b) as, if, and when the Commission denies the interconnection and the District Court nevertheless undertakes to direct it" (410 U.S. at 377).

General Telephone & Electronics Corp., 351 F. Supp. 1153, 1182 (D. Hawaii, 1972), *aff'd. in part and rev'd. in part*, 518 F.2d 913, 918-20 (9th Cir. 1975); *Macon Products Corp.* v. *Am. Tel. & Tel. Co.*, 359 F. Supp. 973 (C.D. Cal. 1973).

Regulated conduct is, however, deemed to be immune by implication from the antitrust laws in two [26] relatively narrow instances: (1) when a regulatory agency has, with congressional approval, exercised explicit authority over the challenged practice itself (as distinguished from the general subject matter) in such a way that antitrust enforcement would interfere with regulation (*Pan American World Airways* v. *United States*, 371 U.S. 269 (1963); *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975); *United States* v. *National Association of Security Dealers*, 422 U.S. 694 (1975)), and (2) when regulation by an agency over an industry or some of its components or practices is so pervasive that Congress is assumed to have determined competition to be an inadequate means of vindicating the public interest. *Otter Tail Power Co.* v. *United States, supra*, 410 U.S. at 373-78; *United States* v. *National Association of Security Dealers, supra; Silver* v. *New York Stock Exchange, supra.*

Gordon v. *New York Stock Exchange, supra*, upon which defendants heavily rely, and *United States* v. *National Association of Security Dealers* (NASD), *supra*, decided the same day, are the most recent Supreme Court expressions on the kind of analysis that must be applied in determining when an antitrust suit will lie against a member of a regulated industry.

Gordon was an action brought by small investors who challenged a system of fixed stock exchange commission rates sanctioned by the SEC. In its decision, the Court reaffirmed what it had held many times before: that repeal of

[26] The two categories are not clearly distinct, and they sometimes merge in their analysis and application.

the antitrust laws is not favored; that repeal will be implied only where there is a plain repugnancy between antitrust and regulatory provisions and then only to the minimum extent necessary; that in the absence of regulatory supervision there can be no conflict; and that both the presence of a pervasive regulatory scheme and the existence of regulatory action under a specific regulatory provision are factors in finding a repeal of the antitrust laws by implication (422 U.S. at 682-689). The Court then went on to find regulation by the SEC to be such regulatory action, and section 19(b)(9) of the Securities Exchange Act of 1934, 15 U.S.C. § 785(b), which grants to the Commission review power over the fixing of commission rates, to be such a specific regulatory provision.

The Court indicated that in making that determination it was heavily influenced by two factors: (1) by granting to the SEC permission to approve the fixing of commission rates after the Court's decision in *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927) (which had held this kind of rate fixing to be a per se violation of the Sherman Act), the Congress had made a deliberate choice to give the agency the authority to supervise self-regulation with respect to commission rate fixing (422 U.S. at 681, 685), and (2) the Commission had "taken an active role in review of proposed rate changes during the last 15 years" (422 U.S. at 685). Thus it concluded (422 U.S. at 681),

> The statutory provision authorizing regulation, § 19(b)(9), the long regulatory practice, and the continued congressional approval illustrated by the new legislation, point to one, and only one, conclusion. The Securities Exchange Act was intended by Congress to leave the supervision of the fixing of reasonable rates of commission to the SEC. Interposition of the antitrust laws, which would bar fixed commission rates as per se violations of the Sherman Act, in the face of positive SEC action, would preclude and prevent the operation of the Exchange Act as intended by Congress

> and as effectuated through SEC regulatory activity. Implied repeal of the antitrust laws is, in fact, necessary to make the Exchange Act work as it was intended; failure to imply repeal would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates.

Similarly, in *NASD, supra,* the Court held that vertical restrictions in secondary market activities designed to maintain prices in brokerage transactions of specified mutual fund shares were precisely among the kinds of restrictions on competition that Congress might have thought were "necessitated by the unique problems of the mutual fund industry . . . (422 U.S. at 729) when it enacted section 22(f) of the Investment Company Act of 1940, 15 U.S.C. § 80a-1 et seq. With respect to the alleged horizontal combination and conspiracy to prevent the growth of a secondary dealer market in the purchase and sale of mutual fund shares, the Court found the SEC's exercise of regulatory authority to be so pervasive as to confer an implied immunity. The Court held "fatal" to the government's complaint that the SEC had consistently and for nearly 35 years approved the restrictive agreements to which the activities the antitrust action sought to curb were ancillary (422 U.S. 733-4), and it found significant the SEC's urging that its authority would be seriously compromised if the agreements were deemed actionable under the Sherman Act (422 U.S. at 729).[27]

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[27] *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1972), and *Pan American World Airways* v. *United States, supra,* also relied on by defendants in this proceeding, involved similarly explicit regulatory schemes. In *Hughes Tool,* the Court found that the challenged transactions fell precisely within the detailed scheme for administrative treatment established by Congress in section 408 of the Federal Aviation Act of 1958, 49 U.S.C. § 1378, and that, inasmuch as the Civil Aeronautics Board had issued an order under that section approving them, the transactions were immunized from the antitrust laws by section 414 of the Act, 49

Thus, the inquiry in this case must focus upon (1) whether the activities which are the subject of this complaint were required or approved by the Federal Communications Commission, pursuant to explicit statutory authority, in a way that is incompatible with antitrust enforcement, and (2) whether these activities are being so "pervasively" regulated that an immunity from antitrust action must be assumed. In my judgment, these questions must be answered in the negative.

We do not start with a clean slate, neatly balancing whether there should or should not be antitrust jurisdiction. The complaint alleges serious violations of the Sherman Act, and if the government is able to prove these allegations, it follows that a substantial violation of that fundamental charter of American economic life has occurred. The burden is on defendants to demonstrate that they or their practices were intended to be exempt or immune from the broad mandate of the Act. To carry that burden, defendants rely on the Supreme Court decisions discussed above which found certain companies to be immune from the antitrust laws based upon a degree of regulation by government agencies which, as a practical matter, left them no choice but to follow the regulatory schemes and orders. But such regulation is not present in this case.

At the outset, it must be noted that two of the defendants in the instant action, Western Electric and Bell Labs, are not subject to direct regulation by the Federal Communications Commission at all. Defendants' assertion that "each of the general charges of alleged conduct . . . relates to matters which are within the jurisdiction of the regulatory agencies" (Status Memorandum, p. 5), is contradicted by

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U.S.C. § 1384. Similarly, in *Pan American Airways*, the Court held that section 411 of the Federal Aviation Act of 1948, 49 U.S.C. § 1381, had granted to the CAB the very jurisdiction (over unfair competition in air traffic) that was at the heart of the antitrust complaint.

the more precise and more accurate statement of the Federal Communications Commission (Memorandum as *amicus curiae*, filed December 30, 1975, pp. 21-25) that it "has no direct regulatory responsibility for . . . Western Electric and Bell Laboratories," although it may indirectly affect them through its determination of the reasonableness of expense and rate base items claimed by AT&T. See *Smith* v. *Illinois Bell Telephone Co.*, 282 U.S. 133 (1930). Legislative history over the years shows that congressional concern over AT&T's intra-corporate structure never matured beyond directing the Federal Communications Commission to conduct a study. Once that study was completed (Federal Communications Commission, *Report on the Investigation of the Telephone Industry in the United States*, H.R. Doc. No. 340, 76th Cong., 1st Sess. (1939)), Congress took no further action, nor was the Commission given authority to take further action.

Consequently, it has been the Federal Communications Commission's consistent position that it has no authority to alter, regulate, or otherwise to interfere with AT&T's internal structure, including its relationships with Western Electric and Bell Labs. See Federal Communications Commission, *Report on the Investigation of the Telephone Industry in the United States, supra*, at 487-589; Consent Decree Program of the Department of Justice, *Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary*, 85th Cong., 2d Sess. Part II-Vol. II (1958);[28] Consent Decree Program of the Department of Justice, *Hearings before the Antitrust Subcommittee of the House Committee of the Judiciary*, 85th Cong., 2d Sess.

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[28] A letter dated November 30, 1955, from Chairman George C. McConnaughey of the Federal Communications Commission to the Attorney General, introduced at the 1958 hearings, states that "the operations of Western, including its prices and profits, are, of course, not subject to direct control by any regulatory authority." Consent Decree Program of the Department of Justice, *supra*, vol. II at 2233-34.

Part II-Vol. III (1958);[29] Antitrust Problems of the Space Satellite Communications System, *Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 87th Cong., 2d Sess. 281 (1962);[30] *AT&T Charges for Interstate Telephone Service (Phase II)* 64 FCC.2d 1 (1977), pp. 15, 18, 20, 27; and see *International Tel. & Tel. Co.* v. *General Telephone & Electronics Corp.*, 518 F.2d 913 (9th Cir. 1975). Beyond broad general statements, defendants have cited nothing to the contrary. In view of this history, it is difficult to see on what basis Western Electric, Bell Labs, or the relationships involving them, could be considered immune from the antitrust laws on any theory.

AT&T's Long Lines Department and the Bell Operating Companies are in a somewhat different posture, for they are subject to FCC regulation in a variety of ways, and the Commission has to a substantial extent exercised this authority. See, *e.g.*, *Specialized Common Carrier Services*, 29 FCC.2d 870, 31 FCC.2d 1106 (1971), *aff'd. sub nom., Washington Utilities and Transportation Commission* v. *Federal Communications Commission*, 513 F.2d 1142 (9th Cir. 1975), *cert. denied sub nom., National Association of Regulatory Utility Commissioners* v. *Federal Communications Commission*, 423 U.S. 836 (1975); *MCI Communications Corp.* v. *Am. Tel. & Tel. Co.*, 496 F.2d 214 (3rd Cir.

[29] Bernard Strassburg, Chief of the Telephone Division of the Federal Communications Commission, testified in those hearings that the Commission lacks the authority to directly regulate Western Electric. Consent Decree Program of the Department of Justice, *supra*, vol. III at 3446, 3543-44.

[30] Chairman Newton N. Minow of the Federal Communications Commission testified before the Committee in 1962 that "we have no statutory authority to regulate the prices charged by Western Electric for its equipment sales to the American Telephone & Telegraph Co." Antitrust Problems of the Space Satellite Communications System, *supra* at 283.

1974). But there is nothing in either the Communications Act or the related statutes to suggest that, with respect to the activities and relationships[31] which are significant to this case, Congress intended to vest in the Federal Communications Commission such pervasive regulatory authority as to override antitrust considerations, nor is there anything to indicate that the antitrust laws are incompatible with the operation of these regulatory statutes as intended by the Congress.

The situation here is thus considerably different from that presented in *Gordon* v. *New York Stock Exchange, supra.*[32] In *Gordon* the Supreme Court said that the antitrust laws could not be applied where the Congress had given the Securities and Exchange Commission exclusive jurisdiction to supervise the fixing of rates of commission for transactions on the stock exchanges and where the Securities and Exchange Commission had in fact exercised that jurisdiction. By contrast, the Federal Communications Commission has not been granted exclusive jurisdiction over what may be called the interconnection areas,[33] but by

[31] *E.g.*, relationships with private mobile radio systems, radio common carriers, miscellaneous common carriers, specialized common carriers, and manufacturers and sellers of terminal equipment for communications systems.

[32] The distinction is significant inasmuch as *Gordon*, and its companion case *United States* v. *National Association of Security Dealers*, represent the outer limits of the Supreme Court's application of the implied immunity doctrine. Other Supreme Court law is even more hospitable to the antitrust laws and less apt to imply an immunity.

[33] In addition to certain claimed violations with respect to manufacturing, research, and sales and purchases of the fruits of manufacturing and research, much of this suit involves defendants' alleged failure to allow various types of entities to interconnect.

statute shares that jurisdiction with the courts. 47 U.S.C. § 406.[34]

More importantly, the regulatory charter of the Commission itself, while broad in many respects, is at the same time relatively weak. For example, telephone tariffs—a primary regulatory tool—become effective upon filing by the carrier after 90 days notice without the necessity for Commission scrutiny or approval (47 U.S.C. § 203(b)(1)); a carrier may file a new or revised tariff at any time (47 U.S.C. § 204); and the power of the Commission to suspend a tariff is limited to a five-month maximum (47 U.S.C. § 204). The weakness of the regulatory scheme is reinforced by a volume of tariff filings beyond the capacity of the Commission to handle. During the 12-month period from September 1974 through August 1975, the Commission received 1,371 tariff filings totaling 11,491 pages, and because of this volume, it was able to investigate only a small percentage of the tariffs. Thus, it is not surprising that the Commission has concluded that "rate filings generally proceed from the carrier's independent judgment. . . ." Memorandum of FCC, filed December 30, 1975, pp. 19-20.

The statutory weaknesses, the general inability of the Commission to scrutinize all the tariffs submitted to it, and perhaps other factors (*e.g.*, the lack of adequate resources effectively to regulate AT&T, a corporate giant),[35] have

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[34] Section 406 provides that "the district courts of the United States shall have jurisdiction . . . [of allegations of] any violation, by a carrier subject to this chapter which prevent the relator from receiving service in interstate or foreign communication by wire or radio, or in interstate or foreign transmission of energy by radio, from said carrier at the same charges, or upon terms or conditions as favorable as those given by said carrier for like communication or transmission under similar conditions to any other persons." See also, 47 U.S.C. §§ 207, 407, 414.

[35] See, *e.g.*, Business Week, ***Why the Justice Department Took AT&T to Court,*** (Nov. 30, 1974) pp. 68-70.

produced the result of a far less than pervasive or specific regulation of the areas that are critical to this case. In any event, whatever the reasons, it is clear that regulation of defendants' conduct has not been such that this antitrust action would disturb or interfere with it.[36]

The FCC—unlike, for example, the SEC in the stock exchange cases—has consistently taken the position that antitrust enforcement through court action is not precluded in this area.[37] *In the Matter of Amendment of Subpart F of Part 1 of the Commission's Rules,* 42 FCC 905, 906, 910-912 (1959); *In the Matter of the Applications of the Connecticut Water Co. & Woolridge Bros., Inc.,* 25 FCC 1367, 1378 (1958). In its memorandum filed with the Court in this case on December 30, 1975, the Commission noted (p. 27):

> To the Commission's knowledge, no court has ruled that the regulatory jurisdiction of the FCC and/or state agencies has ousted entirely the antitrust jurisdiction of the district courts. Several courts have expressly rejected that argument, and have held that primary jurisdiction referral is the appropriate accommodation . . . . The Commission has accepted primary jurisdiction referrals in many cases, has resolved the issues referred for its consideration, and has certified back the results for the courts' ultimate determination . . . . This procedure has satisfactorily accommodated the regulatory requirements, and the Commission be-

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[36] Even when the regulation is "pervasive," and the precise conduct attacked in an antitrust suit is being regulated, an immunity will be found only if the antitrust remedy conflicts with rather than complements the enforcement efforts of the regulatory agency. *Mt. Hood Stages, Inc.* v. *Greyhound Corp.,* 555 F.2d 687 (9th Cir. 1977), *vacated and remanded on other grounds,* 46 U.S. L.W. 4719 (June 19, 1978).

[37] An agency's consistent construction of its own enabling legislation is entitled to considerable weight. See *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969).

lieves it to be preferable to total ouster of the antitrust courts.

Among the considerations it cited in support of its position, the Commission stressed, *inter alia*, that, while under section 214 of the Communications Act, 47 U.S.C. § 214, it has exclusive market entry authority, antitrust actions not only do not necessarily conflict with that authority, but might even complement it in appropriate circumstances; the courts and the Commission have concurrent responsibilities, but when there is a conflict, the doctrine of primary jurisdiction [38] is adequate to resolve the matter; the Commission has never considered its authority over equipment interconnection to displace the antitrust laws; and even with respect to tariffs, since, as noted *supra*, they often become effective without Commission scrutiny or approval, the courts appropriately exercise antitrust jurisdiction.[39]

An examination of the complaint in this proceeding against the implied immunity doctrine and its philosophic underpinnings verifies the Commission's conclusion.[40] The

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[38] See note 45, *infra*.

[39] The Commission considers, however, that when it has prescribed or specifically approved a tariff, its judgment must control (FCC Memorandum of December 30, 1975, p. 20).

[40] While the district court decisions are not entirely consistent in this area, the better-reasoned cases likewise support these conclusions. In *Jarvis* v. *Am. Tel. & Tel.*, Civ. 74-1674 (D.D.C. August 7, 1978), Judge Robinson of this Court held that Commission regulation of interconnection and tariffs over this defendant is not so pervasive that regulatory control should be deemed inconsistent with the application of the antitrust laws. See also, *Industrial Comm. Sys. Inc.* v. *Pac. Tel. & Tel. Co.*, 505 F.2d 152, 156 (9th Cir. 1974); *Macon Products Corp.* v. *Am. Tel. & Tel. Co.*, 359 F. Supp. 973, 976 (C.D. Cal. 1973). Despite defendants' contention that *Jarvis* is in error (Defendants' Reply to Supplemental Response for the United States), the decision is consistent with both the Supreme Court's and the Federal Communications Commission's views. See *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976); *Georgia* v. *Pennsylvania R. R. Co.*, 324 U.S. 439, 454-460 (1945); Response of Federal Communications Commission in *Am. Tel. & Tel. Co.* v. *United States*, No. 77-1009 (D.C. Cir.), p. 18. The decisions cited by defendants in this regard are inapposite. *Western Electric Co.* v. *Milgo Electronics Corp.*, 1978-1 Trade Cases, No. 61,960 (S.D. Fla. 1976), *appeal dismissed*, 508 F.2d 1203 (5th Cir. 1978), involved a question of standing, the court noting only that because of a recent administrative program instituted by the FCC, certain paragraphs of a counterclaim might not be properly before the court. In *Citizens Utilities Co.* v. *Am. Tel. & Tel. Co.*, 1978-1 Trade Cases, No. 61,959 (N.D. Cal. 1977), the court dismissed a sixteen-year old antitrust case for want of prosecution, stating by way of dictum that dismissal might also be warranted on exclusive or primary jurisdiction grounds because the FCC was the proper forum for the subject matter (division of revenues within the telephone industry). In *Data Corp.* v. *General Telephone Co. of California*, 1977-2 Trade Cases No. 61,610 (C.D. Cal. 1977), the court dismissed the complaint because of the peculiar subject matter, but expressly disavowed holding "that the telephone companies may never be sued under the antitrust laws," citing Judge Waddy's opinion in the instant case. *Monitor Business Machines, Inc.* v. *Am. Tel. & Tel. Co.*, 1978-1 Trade Cases, No. 62,610 (C.D. Cal. 1978), and *Phonetele Inc.* v. *Am. Tel. & Tel. Co.*, 435 F. Supp. 207 (C.D. Cal. 1977), both involved relatively narrow interconnection areas which the courts found to have been extensively regulated by the Federal Communications Commission. In short, all of these cases are distinguishable on their facts. To the extent that some language in the opinions may differ from the conclusion reached here, like Judge Robinson in *Jarvis*, I decline to follow them.

allegations of the complaint describe conduct that quite obviously was not stimulated by regulatory supervision or coercion; it is of a character that reflects defendants' business judgment that its profits might be maximized if potential competitors were discouraged from entering the various markets AT&T controls. See *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, *supra*, 411 U.S. at 733; *Otter Tail Power Co.* v. *United States*, *supra*, 410 U.S. at 374; *Silver* v. *New York Stock Exchange*, *supra*.

According to the complaint,[41] defendants have chosen to engage in a variety of predatory activities designed to shut out potential competitors from the telecommunications markets, including the denial to competing entities of interconnection privileges with AT&T's monopoly facilities; unlawful rate adjustments in response to competition; refusal to permit telephone customers to provide their own terminal equipment and to interconnect it to AT&T's network; and perpetuation of various production and marketing practices designed to curb competition. There is absolutely nothing to suggest that Congress expected the Commission to require or approve, or that the Commission did require or approve any of these practices. These activities not only violate the antitrust laws but they are also inconsistent with the purpose of the regulation, or at the very least they are not required or encouraged either by regulatory theory or by regulatory action.

In such a posture, the abstract philosophical differences between regulation and competition will hardly serve to oust the antitrust laws from their normal function and effect. The purpose of the implied immunity rule is to eliminate adherence to antitrust standards when there are irreconcilable differences between the antitrust laws and federal regulatory statutes.[42] But the antitrust laws cannot be held hostage to a supposed irreconcilability between antitrust and regulatory enforcement when no such irreconcilability exists in fact, nor can the alleged unlawful actions of defendants be deemed protected from the Sherman Act by the cloak of generalized regulation of AT&T by the Commission.

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[41] See pp. 1-2, *supra*.

[42] Immunity will be implied only if necessary to make the regulatory statutes work, "and even then only to the minimum extent necessary." *Gordon* v. *New York Stock Exchange*, *supra*, 422 U.S. at 685.

In short, it would be a gross misconception of the realities to equate the instant statutory scheme, the relatively weak regulatory controls which have implemented that scheme, and defendants' alleged activities which offend both the antitrust laws and the regulatory purposes, with the kind of explicit regulation endorsing industry conduct which the Supreme Court has held in relatively few instances to be inconsistent with antitrust enforcement.[43]

There is another, alternative basis for reaching the same conclusion. This complaint alleges a broad conspiracy to monopolize various aspects of the telecommunications industry through a symbiotic relationship among AT&T, Western Electric, Bell Labs, and the Bell Operating Companies (see p. 2, *supra*). Even if it be assumed, *arguendo*, that the Commission exercised explicit regulatory authority over only some segments of the activities challenged in the complaint, it does not follow that defendants are immune from antitrust liability even with respect to them. Defendants' purpose is alleged to be the monopolization of the telecommunications service and equipment market, and the bulk of their conduct, including that revolving around Western Electric and Bell Labs, cannot under any reasonable view be regarded as immune from antitrust enforce-

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[43] Additionally, it is not insignificant that, even with respect to that portion of defendants' activities which the Commission does regulate, only the courts can grant complete relief. The Commission has little authority to vindicate injury to competitors; there is no statutory provision authorizing it to order divestiture; and it is unable to adopt remedies designed to foreclose future anticompetitive conduct. See generally, *Am. Tel. & Tel. Co.* v. *FCC*, 487 F.2d 865, 881 (2d Cir. 1973); *Nader* v. *FCC*, 172 U.S. App. D.C. 1, 520 F.2d 182, 206 (1975); cf. *Hewitt-Robins* v. *Freight-Ways, Inc.*, 371 U.S. 84 (1962); but see, *General Telephone Co. of the Southwest* v. *United States*, 449 F.2d 846 (5th Cir. 1971). Congress could hardly be deemed by implication to have conferred immunity on carriers such as these defendants when the effect of its assumed action would be to insulate the alleged antitrust violators from effective sanctions or relief.

ment by virtue of regulation. In that circumstance, the remainder of the challenged conduct is likewise subject to antitrust consideration, both because it constitutes a means for achieving an unlawful end (*California Motor Transport* v. *Trucking Unlimited,* 404 U.S. 508, 515 (1972)), and because it represents one facet of a larger monopolistic scheme. See *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 222 (1966); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690 (1962); *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289, 316 (1973) (Marshall, J., dissenting).

According to the government (Brief in *Am. Tel. & Tel. Co.* v. *United States,* No. 77-1109 (D.C. Cir.), pp. 5-6), defendants dominate three markets—long distance transmission, equipment manufacturing, and local franchise monopolies—and they use the leverage from their control of each to defend and support their monopoly position in the other two. It is precisely in this kind of situation, that the doctrine of primary jurisdiction is most useful,[44] and this Court is fully prepared to refer appropriate issues to the FCC under that doctrine (see note 45, *infra*). But it would subvert the purposes of the antitrust laws totally to sever from the case and to refer to the Commission some of the issues on the theory that it has exclusive jurisdiction when the consequence of such a referral would be that a significant portion of what is alleged to be one comprehensive, integrated, and mutually supporting conspiracy could never be considered by the courts. See *Georgia* v. *Pennsylvania Railroad Co.,* 324 U.S. 439 (1945). This would then leave the courts with a truncated antitrust action—a result that would stand the principle of careful non-interference between legitimate regulatory and antitrust enforcement on its head.

[44] See Mr. Justice Brennan's dissent in *Pan American World Airways* v. *United States, supra,* 371 U.S. at 331-2.

While it is not necessary here to rely directly upon these "comprehensive monopoly" principles in adjudicating the jurisdictional issue, they provide additional and alternative support for the conclusion that antitrust jurisdiction has not been ousted by the regulatory scheme.

For these reasons, the Court rejects defendants' contention that the Court lacks antitrust jurisdiction over the matters alleged in the complaint. However, in the event that it should subsequently appear after the issues have been crystallized—*e.g.,* after discovery has been completed—that with respect to some of defendants' conduct the Commission has special expertise or there may be a conflict between antitrust enforcement and regulation, the issues relating to such conduct will be referred to the Commission under the doctrine of primary jurisdiction.[45] But there is no basis

[45] While the term "primary jurisdiction" has been widely used, including by the U.S. Supreme Court, it deserves some clarification. A referral under that doctrine does not oust a court of jurisdiction; it merely serves as a means for requesting a regulatory agency to make preliminary factual and legal determinations while reserving to the court the authority to decide the ultimate questions. Judge Waddy's opinion of November 24, 1976, concluded that some of the issues herein might be referred to the FCC under that doctrine. It is clear from *Ricci* v. *Chicago Mercantile Exchange, supra,* that such a referral is appropriate particularly where there is a need to resolve possible conflicts between the objectives of the antitrust laws and the regulatory standards, and where an adjudication of such issues by the regulatory body will be of material aid in the ultimate decision of the antitrust issues. It is my intention, as it was Judge Waddy's, to make such appropriate references to the FCC. According to the Commission (Memorandum as *amicus curiae,* p. 29) issues which substantially affect the following matters should be referred to it under the principle of primary jurisdiction: (1) entry into or exit from a communications carrier market; (2) FCC orders requiring interconnection; and (3) tariff provisions which the Commission has approved or precluded. It would be premature at this point to conclude the extent to which these conditions exist with respect to particular issues in this case, or whether there may be other matters appropriate for referral to the Commission.

for defendants' continued insistence that the jurisdictional issue [46] is not settled [47] or that, until it is settled in their favor, it is not possible to proceed with this case in a way that is fair to both parties. The issue was decided against defendants by Judge Waddy, and his decision was not disturbed either by the U.S. Court of Appeals or the U.S. Supreme Court. Upon careful reconsideration, this Court again reaches the conclusion that it has jurisdiction of this action and that no part of this case is within the exclusive jurisdiction of the Federal Communications Commission.[48]

II

Defendants have submitted a proposed order providing that "the plaintiff in this case is the government of the United States of America including all of the departments, agencies, bureaus, and other subdivisions thereof from which defendants have sought recovery." The effect of this order, if adopted by the Court, would be to subject all agencies and departments of the government to discovery under Rule 34 of the Federal Rules of Civil Procedure. The Department of Justice argues that only it is a party, and that

[46] *I.e.*, the issue of whether or not the Commission has *exclusive* jurisdiction.

[47] Throughout their status memoranda, defendants assert that there must be "a prompt determination of the jurisdictional issue" (Reply Memorandum, p. 3), that the means to expedite this case is to have "an early and definitive resolution of the fundamental jurisdictional issue that overhangs all of the proceedings in this case" (Reply Memorandum, p. 49), and that the Court will have to resolve "once and for all *whether*—and, if so, the extent to which—it has jurisdiction" (emphasis supplied) (Status Memorandum, p. 47).

[48] For that reason defendants' proposed Pretrial Order No. 9 which would limit discovery to the jurisdictional issues *seriatim*, followed in each instance by further briefing and court review, is denied.

discovery from other government agencies and departments must proceed under the more restrictive provisions of Rule 45, F.R.Civ.P. The question that is raised by these opposing positions is "who is the plaintiff?"

It should be noted at the outset that some discovery has been and is being secured to a limited extent from government agencies other than the Department of Justice. On April 27, 1978, Magistrate Margolis, with the consent of the parties, entered Discovery Order No. 2, paragraph 4 of which requires some forty government agencies to respond to the following questions: (i) whether they will produce the documents designated in their entirety for inspection and copying; (ii) whether they object in whole or in part to defendants' designation and the reasons therefor; (iii) whether they will submit disputes over production of documents to the Magistrate for resolution without formal service of a subpoena; and (iv) whether they will submit claims of privilege to the Special Master or the Court for resolution. Generally, the agencies responded by stating that (i) they would not produce the documents in their entirety; (ii) they had objections to various aspects of the discovery sought; (iii) they would submit disputes over production to the Magistrate without formal service of a subpoena; and (iv) they would submit claims of privilege to the Special Master or the Court.[49]

[49] There were variations in the responses of the agencies. For example, the General Services Administration noted that it would cooperate "provided AT&T is required to state with specificity its reasons for objecting to a GSA claim of privilege;" the Office of Management and Budget and the Council of Economic Advisers are willing to submit claims of privilege to the Court or the Special Masters "other than claims of executive privilege;" the Department of State "is unable to say at this time whether or not it may subsequently determine to submit certain claims of privilege only to the Court;" the Central Intelligence Agency said that privilege claims might in some cases have to be supplemented by *ex parte, in camera* proceedings; the Department of the Navy

Plaintiff contends that the present arrangement, together with whatever discovery defendants may be able to secure under Rule 45, adequately protects defendants' interests, and that therefore it is not necessary to decide the issue posed by defendants' proposed pretrial order. This position is not well taken, for a number of reasons.

First. The Department of Justice suggests that the voluntary system is working and will continue to work well. Yet it is apparent that problems already exist in the operation of that system, and these are likely to become magnified in the future. One difficulty is that the present procedure is cumbersome in view of the numerous agencies involved, the sheer size of the discovery requests addressed to them, and the fact that defendants are forced, more or less, to depend upon the good offices of the Department of Justice to secure this discovery.

Another, perhaps potentially even more serious, drawback is that the voluntary system permits each agency to continue to view itself as a distinct entity with individual interests which do not necessarily parallel those of the gov-

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cautioned that "the anticipated extreme sensitivity of certain documents which are requested may require formal proceedings on privilege assertions prior to production;" the National Security Agency "will submit claims of privilege [only] to the court for resolution;" the Securities and Exchange Commission answered that "this statement does not constitute a waiver of any objections or other procedures that may be available to the SEC;" and the Department of the Treasury and the National Science Foundation likewise "will submit claims of privilege [only] to the court for resolution." The Federal Communications Commission did not submit a response in any form, consistently with its position that it will respond only to discovery subpoenas issued pursuant to Rule 45. See discussion, at pp. 30-34 *infra*. The United States Postal Service, which has taken a similar position, did file a response reiterating its view that absent a Rule 45 subpoena it is not legally required to respond to defendants' discovery demands, but that it would be willing to participate in discussions with defendants concerning production of necessary Postal Service documents.

ernment as a whole in the prosecution of this suit. Not only does this place practical burdens on defendants, but it adds an awkward tension to discovery. AT&T requires each agency's full cooperation to obtain the discovery it needs, and if the agencies were to be considered part of the plaintiff in this action, it would be entitled to that cooperation as a matter of right. But if the agencies are not included in the concept of "plaintiff," there is no such entitlement, and since the agencies (other than the Department of Justice) may have little to gain by their cooperation, whether by discovery or otherwise, they would be likely to limit the level of their participation in voluntary discovery to the minimum dictated by their own parochial interests.

Second. When dealing with the government, effective sanctions are not available for noncompliance with requests under Rule 45. The only real sanction contemplated by that Rule is contempt of court,[50] and it is normally available only against the head of an agency rather than a subordinate. *United States* ex. rel. *Touhy* v. *Ragen*, 340 U.S. 462 (1951); *Boske* v. *Comingore*, 177 U.S. 459 (1900); *Appeal of United States Securities & Exchange Commission*, 226 F.2d 501 (6th Cir. 1955). Thus, should government departments be or become reluctant to produce records at any stage during this litigation, the Court's only remedy, if it intended to protect defendants' rights, would be to hold high officials in wholesale contempt. Whatever might be the theoretical amenability of heads of government departments to the Court's contempt power, in the context of its possible application to many officials in a great number of potential discovery disputes that power would undoubt-

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[50] See Rule 45(f). Possible sanctions for non-compliance with Rule 34 are far more flexible, *e.g.*, striking of pleadings, deeming certain matters to be established, precluding the use of particular items of evidence. Rule 37(b)(2), F.R.Civ.P.

edly prove to be an extremely blunt and unwieldy, and hence impractical, instrument.[51]

Third. Rule 34 is a more manageable discovery mechanism than Rule 45 in a number of different respects. In the first place, under Rule 34, the parties proceed by request, without leave of the Court; discovery is limited only by the relevancy requirements of Rule 26(b)(1), F.R.Civ.P.; and the Court becomes involved only when production is objected to or there is non-compliance. See Rule 37, F.R.Civ. P. While Rule 45 discovery is likewise initiated by request of a party, a subpoena will issue only through the Clerk under seal of the Court. Moreover, the person to whom the subpoena is directed may move to quash it on grounds that it is unreasonable or oppressive, even if the material is otherwise relevant within the meaning of Rule 26. See *Collins and Aikman Corp.* v. *J. P. Stevens & Co.*, 51 F.R.D. 219, 221 (D.S.C. 1971); Wright and Miller, *supra*, Civil § 2457, pp. 433-4. When a department is considered a party, the scope of governmental privileges it may claim is narrower than when it is not. Cf. Moore's Federal Practice, *supra*, paras. 26.60[6], 26.61[6.-1]; *Fleming* v. *Bernardi*, 1 F.R.D. 624 (N.D. Ohio 1941); *United States* v. *General Motors Corp.*, 2 F.R.D. 528 (N.D. Ill. 1942). Rule 45 could also be more expensive since the Court may condition denial of a motion to quash upon an advancement of costs by the party on whose behalf the subpoena is issued. Rule 45(b)(2); *United States* v. *International Business Machines Corp.*, 62 F.R.D. 526, 528-9 (S.D.N.Y. 1974); *Blank* v. *Talley Industries, Inc.*, 54 F.R.D. 627 (S.D.N.Y. 1972). In this litigation, where defendants will have to undergo the expense of producing millions of their own documents, Rule 45 dis-

[51] Prof. Moore has noted (4 Moore's Federal Practice, para. 26.61[5.-1] pp. 26-287-89), ". . . where the government is not a party . . . the determination of the head of the department or agency that disclosure should not be allowed for all practical purposes has been final and unreviewable."

covery might saddle them in addition with the expenses connected with the production of millions of documents from various government agencies.[52] Finally, the logistics of proceeding by subpoena against forty or more government agencies may be expected to be cumbersome. See, *e.g.*, *Freeman* v. *Seligson*, 132 U.S. App. D.C. 56, 405 F.2d 1326, 1352 (1968).

Fourth. This litigation and its discovery phase are likely to be protracted, and there is no assurance that the voluntary commitments of the several agencies and departments, such as they are, will stand the test of time. Discovery will take many months at a minimum (pp. 49-51, *infra*), and it is not unlikely that demands will be made which some agencies and departments will find uncomfortable. The temptation to renege on or further to condition the present voluntary arrangement will then be geat, and endless, multifaceted disputes and concomitant delays are likely to ensue.

For those reasons, defendants are entitled to a decision on their request for Rule 34 discovery, and hence the issue of who is the plaintiff in this case cannot be avoided.[53]

There is surprisingly little law on the question of whether, for discovery purposes in an action instituted in the name of the United States the plaintiff is the Department of Justice or some broader entity. There are a few scattered decisions in the criminal area, involving the discovery mechanisms recognized by the Jencks Act (18

[52] That this is a reality is borne out by the fact that the Postal Service has already indicated its intention not to produce the requested documents unless it is reimbursed by defendants.

[53] Counsel for the government has suggested that this question be deferred until such time as logistical and other problems become so unmanageable that the "voluntary" system must be abandoned. The Court sees no purpose in temporarily avoiding a decision that eventually will have to be made in any case. A postponement of the decision would only prolong and exacerbate discovery disputes.

U.S.C. § 3500) and by *Brady* v. *Maryland*, 373 U.S. 83 (1963), which, while not dispositive,[54] are certainly instructive.[55] Typical of these criminal cases is *United States* v. *Bryant*, 142 U.S. App. D.C. 132, 439 F.2d 642, 650 (1971), where the Court of Appeals for this Circuit, in a case involving possession of evidence by the Bureau of Narcotics and Dangerous Drugs, held that this evidence was producible under the Jencks Act because "the duty of disclosure affects not only the prosecutor, but the government as a whole, including its investigative agencies." See also *United States* v. *Deutsch*, 475 F.2d 55 (5th Cir. 1973); *United States* v. *Erlichman*, 376 F. Supp. 29, 36, 389 F. Supp. 95, 97 (D.D.C. 1974); *Christoffel* v. *United States*, 91 U.S. App. D.C. 241, 200 F.2d 734 (1952); cf. *United States* v. *Burr*, 25 F. Cas. 187, 191 (D. Va. 1807).

The Department of Justice relies to the contrary[56] on such decisions as *United States* v. *Dansker*, 537 F.2d 40 (3rd Cir. 1976), and *United States* v. *Trevino*, 556 F.2d 1265 (5th Cir. 1977). However, it is apparent upon closer examination that these decisions do not support its argument. The documents involved in those cases were in the custody of probation officers, that is, agents of the court, rather than in that of officers of the Executive Branch. The most these cases can be said to stand for is that documents in the possession of the Judiciary or the Congress may sometimes be beyond the reach of criminal defendants (but

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[54] Section 2 of the Sherman Act establishes a criminal offense, but the section 4 enforcement provision here employed is civil in nature. Thus, this is a civil action.

[55] The government acknowledges, indeed asserts, that "the role and responsibility of the antitrust prosecutor is analogous to that of the criminal prosecutor" (Status Memorandum, p. 31).

[56] The government here opposes party production by other government departments, but in *United States* v. *IBM*, 69 Civ. 200 (S.D.N.Y.), an antitrust suit of comparable dimensions, it did not do so.

see note 60, *infra*). However, the Department of Justice has produced nothing to suggest that, in criminal cases, the prosecuting entity can be anything less than the Executive Branch as a whole.

There is a paucity of authority on this issue in the area of civil litigation, and there certainly has been no instance of discovery being sought or required on as broad a scale, involving as many departments of government, as in this case. However, again, the few decisions more or less in point lend at least some support to defendants' position. See, *e.g.*, *Harvey Aluminum* v. *National Labor Relations Board*, 335 F.2d 749 (9th Cir. 1964); *United States* v. *IBM*, 60 F.R.D. 658 (S.D.N.Y. 1973), *appeal dismissed*, 493 F.2d 112 (2d Cir. 1974) *cert. denied*, 416 U.S. 995 (1974); and *United States* v. *National Broadcasting Company*, 65 F.R.D. 415, 419 (C.D. Cal. 1974), *appeal dismissed*, 95 S.Ct. 1668 (1975); cf. *United States* v. *ICC*, 221 F. Supp. 584, 589 (D.D.C. 1963); *Equal Employment Opportunity Commission* v. *Los Alamos Contractors, Inc.*, 382 F. Supp. 1373, 1383 (D.N.M. 1974).

Even aside from precedent, however, it is clear that the limited theory of the nature of the "plaintiff" advanced by the Department of Justice is unacceptable. This action, as its caption indicates, was brought not on behalf of the Department of Justice but on behalf of the United States of America. Civil enforcement proceedings pursuant to section 4 of the Sherman Act have traditionally been so instituted, presumably because the antitrust laws are of quasi-constitutional breadth and significance, and constitute a means for protecting the economic interests of the citizens of this country, not infrequently on a national scale. In the vindication of broad economic policy, it simply makes no sense to hold that the Department of Justice, which essentially is a law office, alone comprises the United States. An ambassador negotiating with a foreign government, the Secretary of the Treasury who authorizes the floating of a bond issue, a military contingent taking action

on foreign soil—they all do so not on behalf of their respective departments but on behalf of this nation as represented by its government.[57]

The Attorney General, as the government's attorney and chief law enforcement officer is, to be sure, the official responsible for instituting and conducting the criminal and civil litigation of the United States. But neither he, nor the department he heads (much less the Antitrust Division), is the United States. Indeed, the basic charter of the Department of Justice (28 U.S.C. § 519) carefully distinguishes between the Attorney General and the government by providing that ". . . the Attorney General shall supervise all litigation to which the United States . . . is a party. . . ." See also, 28 U.S.C. §§ 501, 516-518.

Insofar as this case is concerned, it takes little speculation to conclude that it would not have been brought without consultation with government executives involved in economic policy and possibly with the White House itself, or without prior inquiry into the relationship between defendants and various government departments. Where that is true, it hardly seems reasonable to insulate the entire government, other than the Attorney General's Office, from the direct discovery process of Rule 34.

The theory of the government's case and the relief requested are national in scope and they are likely to involve the documents and the activities of a great number of government departments. Defendants have explained (Defendants' Status Memorandum, pp. 7-8) that "The principal purposes of defendants' document request were to show the extent to which the Bell System's structure and many of its practices are the result of the Government's own poli-

[57] It is unnecessary here to explore such complicating factors as the role of the Congress in these various areas. At a minimum, these responsibilities are being carried out on behalf of the Executive Branch.

cies, the extent to which the Government, as the largest user of defendants' services, has benefited and continues to benefit from the Bell System's structure and practices, the extent to which the Government itself has recognized that the Bell System's horizontally and vertically integrated structure is vital to the nation's economy and to the national defense, the nature and extent of the regulation to which defendants are subject, the regulatory policies that have led to new entry into segments of the telecommunications industry. . . ." While the Court, of course, has not ruled on the relevance of specific requests or categories of requests for documents, it is apparent that defendants will need access to the records of many government agencies, and that fairness to them requires that such access be as unencumbered as the Federal Rules will allow.[58]

Plaintiff has expressed the fear that a precedent against its position here might encourage other litigants in other cases to rummage through the files of the entire government, and so paralyze both the work of numerous agencies and that of the courts. The short answer is that in the various respects described above, the instant case is relatively unique. The Court today holds only that on these peculiar facts, which involve massive and wide-ranging allegations, and in this peculiar action, which involves many departments and their evidence, the United States, having filed the action,[59] cannot claim to be merely the Department of Justice.

[58] Counsel for the government have complained that a ruling equating all executive departments with the United States will complicate their task because they claim to have little influence over other agencies of the government. Obviously, defendants have even less influence over the agencies, and as the entities which have been sued, they are entitled to their discovery rights irrespective of the effect of inter-departmental relationships.

[59] This suit was brought not against but by the United States. Compare *United States* v. *Reynolds*, 345 U.S. 1, 12 (1953), where, in holding that a claim of privilege was not deemed waived in a

That conclusion does not end the inquiry, however, for not all of the agencies from which documents are being sought are directly a part of the Executive Branch. As noted, *supra*, at p. 27, and in such cases as *Dansker* and *Trevino*, even in criminal cases discovery does not always [60] reach the courts (and, for the same reasons, presumably not the Legislative Department). *A fortiori* civil discovery may be regarded as similarly limited. But a more difficult problem is raised by plaintiff's request under Rule 34 for documents in the possession of the Federal Communications Commission and other independent regulatory agencies. That request must be denied, for a number of reasons.

First. There is no basis for holding that a quasi-legislative agency, which the law necessarily regards as an independent body created to execute impartial regulatory responsibilities, becomes a "plaintiff" when the Department of Justice chooses to file a lawsuit on behalf of the United States.[61]

Humphrey's Executor v. *United States*, 295 U.S. 602 (1935), settled once and for all the character of such agencies. The Court's holding in that case may be summarized by its simple statement that "the Federal Trade Commission . . . cannot in any proper sense be characterized as an arm or an eye of the executive . . . and . . . [it] must be free from executive control" (295 U.S. at 628). This principle

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Federal Tort Claims Act suit, the Court noted that the rationale of the criminal cases has "no application in a civil forum where the government is not the moving party but is a defendant only on terms to which it has consented."

[60] If, however, basic constitutional rights are involved, even the legislative and judicial branches may not be immune from process. See, *e.g.*, *Christoffel* v. *United States*, *supra*, 200 F.2d at 739.

[61] Regulatory agencies not infrequently take positions at odds with those of the Executive Branch. See, *e.g.*, *Gordon* v. *New York Stock Exchange*, *supra*; *United States* v. *Interstate Commerce Commission*, 221 F. Supp. 584 (D.D.C. 1963).

is firmly rooted in our laws, and has been continually reaffirmed to the present day. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 132-6 (1976); *Planning Research Corp.* v. *Federal Power Commission*, 181 U.S. App. D.C. 33, 555 F.2d 970 (1977). As a study of regulatory agencies conducted last year by the Committee on Governmental Affairs of the U.S. Senate found:

> Critical to an understanding of the independent form is a recognition that the agencies were intentionally created to be somewhat apart from the rest of the government, in general, and from the White House in particular. It was no accident: Congress wanted regulatory agencies that in fact were not capable of being fully integrated into the executive branch.

Study on Federal Regulation (Committee Print), prepared pursuant to S. Res. 71, Senate Committee on Governmental Affairs, 95th Cong., 1st Sess., Vol. 5, pp. 25, 30 n.17 (1977).[62]

The independence of the Federal Communications Commission from executive control is underscored by the fact that its Commissioners are appointed for fixed terms of seven years; that the terms do not all lapse at the same time; and that Commission members do not serve at the pleasure of the President. *Study on Federal Regulation*, *supra*, pp. 32-39. It is presumably also because of its independent status that the Commission's records are by law placed within the sole "custody" of the Secretary of the Commission. See 47 U.S.C. § 412.

Second. The plain fact is that a party cannot produce that which it does not have. Cf. *LaChemise LaCoste* v. *The Alligator Company, Inc.*, 60 F.R.D. 164, 172 (D. Del. 1974).

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[62] In view of the quasi-legislative status of the Federal Communications Commission, a requirement that it produce documents as a party to an Executive Branch suit might well raise serious constitutional, separation-of-power problems.

In a very real, practical sense, the FCC's records are not in the control of either the Department of Justice or the Executive Branch. If, for example, the head of an Executive Department refused to produce documents required to assist the Department of Justice to prosecute this litigation to its conclusion, the Attorney General could then enlist the aid of the President, who, presumably, would direct their release. Yet, in view of the independent status of a regulatory agency such as the Federal Communications Commission, and the fact that its Commissioners are not subject to removal and therefore not to discipline by the President, the agency is essentially immune from executive direction.[83]

In short, both as a conceptual and as a practical matter, the Federal Communications Commission is free from executive control and not answerable to instructions from the President or the Attorney General.[84] To hold it to be a part

[83] *Harvey Aluminum* v. *NLRB*, *supra*, is not to the contrary. The court there was essentially concerned with Jencks Act statements in the possession of executive departments. The President was held to have adequate authority over such departments to procure production, and the courts to order it. The President lacks that capacity with respect to regulatory agencies and, while the courts' general power in that regard is not doubted, it is limited by considerations of legality and the appropriateness of its exercise under either Rule 34 or Rule 45, F.R.Civ.P.

[84] Cases cited by defendants to the contrary are inapposite. *United States* v. *Reynolds*, *supra*, concerned Air Force records in a case in which the Justice Department was acting as attorney for the Air Force in defense of a tort claim. The Court recognized, *inter alia*, that the custody and control of the documents rested with the Air Force, and it did not require the Department of Justice to produce them. *United States* v. *Proctor & Gamble*, 356 U.S. 677 (1958), involved grand jury transcripts under the control of the Justice Department itself. *Freeman* v. *Seligson*, *supra*, involved a subpoena directed to the Department of Agriculture which sought certain documents that had been furnished to the agency from individual commodity brokers. Neither these decisions nor the principles underlying them provide the slightest support for the proposition that an independent regulatory commission

of the "plaintiff" herein would not only contradict over forty years of legal history, but would effectively leave the conduct of this lawsuit, and perhaps of other actions brought by the government, vulnerable to a virtual veto by one or more independent regulatory agencies. See Rule 37, F.R.Civ.P.[85]

Third. There remains a definite possibility, as noted *supra*, at p. 21, that one or more issues will be referred by the Court to the Commission under the doctrine of primary jurisdiction.[86] Treatment of the Commission as a party

such as the FCC—as distinguished from an Executive Branch agency—is to be considered a party plaintiff in an antitrust suit. See *United States* v. *National Broadcasting Company*, 65 F.R.D. 415, 419 (C.D. Cal. 1974), *appeal dismissed*, 421 U.S. 940 (1975).

[85] These considerations apply equally to the other independent regulatory bodies, from which defendants have sought discovery, such as the Federal Trade Commission and the Federal Power Commission. With respect to the status of the United States Postal Service, the parties have provided little assistance to the Court. However, it appears from an examination of present law that the Postal Service, as an "independent establishment" of the Executive Branch, should not be regarded as a party plaintiff for purposes of this suit. The Service is directed by a board of governors whose members serve staggered nine-year terms and may be removed only for cause (39 U.S.C. § 202); it has an independent financial structure; it has the statutory power "to sue and be sued in its official name" (39 U.S.C. § 401(1)); it controls its own records (39 U.S.C. § 401(4)); and it has been deliberately insulated from three types of political controls: (1) there is a ban on political appointments; (2) the Service is exempt from consideration of non-postal federal economic policies; and (3) the legislative history of the statute establishing the Service shows that, for reasons of efficiency and economy, it was intended to be insulated from legislative or executive control or interference. See 39 U.S.C. §§ 1002, 410(a); H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. 5 (1970), 116 Cong. Rec. 21, 709 (1970).

[86] Such a referral has repeatedly been sought by defendants themselves.

plaintiff might well be incompatible with its role as a decision-maker under that doctrine. Moreover, the Commission's responsibilities as the ongoing regulator of AT&T and its competitors cannot be ignored. The treatment of documents generated in the exercise of those responsibilities will require the utmost sensitivity—a treatment for which Rule 45 discovery is particularly well suited.

In memoranda submitted to the Court, the Federal Communications Commission indicated that it had "not closed the door on voluntary production" should defendants pare down their discovery requests to "reasonable levels, so that the FCC will not be unduly burdened and will not be asked to turn over obviously privileged material." FCC Memorandum of January 23, 1978, p. 17. In the context of one or a few independent regulatory agencies, without the distractions of forty other government agencies with their babel of differing views and interests on the production question, such voluntary cooperation is likely to prove practical and meet all the legitimate requirements of defendants. Should it ultimately prove that the Commission's response to requests from defendants is too niggardly, the defendants may always seek the assistance of the Court under Rule 45. The Court, on its own or through the Magistrate (see *infra*, p. 56), stands ready to assist them to the full extent of its authority with respect to any legitimate requests.

III

Discovery Order No. 2, entered by Magistrate Margolis on April 27, 1978, requires *inter alia* that defendants produce for inspection and copying all microfilm copies of documents, transcripts, and exhibits produced in connection with a number of antitrust actions brought by private parties against AT&T in other districts. Defendants have appealed this order to the Court, contending that, for a number of different reasons, such a requirement is inconsistent with the spirit, if not the letter, of the Federal Rules of Civil Procedure.

It is appropriate initially to articulate precisely what is currently at issue between the parties with respect to Discovery Order No. 2. The order may be read to include three types of documents generated in seven other court proceedings:[87] (1) documents (or microfilm copies of documents) produced by AT&T to the private plaintiffs, and selected for use by the private plaintiffs, (2) documents produced by the private plaintiffs to AT&T, and (3) documents produced by third parties to AT&T, to the private plaintiffs, or to both. According to the United States, however, it seeks only those documents in the first of these three categories. Reports for the United States concerning Magistrate's Order No. 2, filed June 7, 1978.[88] Moreover, it has actively pursued its request for production with respect to documents produced in only two of the other court proceedings. See note 91, *infra*. Thus, the question before the Court is whether defendants should be required in this proceeding to produce to plaintiff here copies of documents previously produced and selected for use in the lawsuits brought against defendants by Litton Systems, Inc. and MCI Communications Corp. in the Southern District of

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[87] *Litton Systems, Inc.* v. *Am. Tel. & Tel. Co.*, No. 76 Civ. 2512 (S.D.N.Y. 1976); *Marcom Inc.* v. *Am. Tel. & Tel. Co. and Pacific Telephone Co.*, Civil No. 43215 (N.D. Cal. 1965); *MCI Communications Corp.* v. *Am. Tel. & Tel. Co.*, Civil No. 74 C 633 (N.D. Ill. 1974); *Milgo Electronic Corporation* v. *Am. Tel. & Tel. Co., Western Electric, Southwestern Bell, Boeing Computer*, Civil Action No. 76-15-C2 (D. Kan.) (antitrust counterclaim only); *Morse Products Manufacturing Co.* v. *Am. Tel. & Tel. Co.*, No. 75-1704 (D.D.C. 1975); *Northeastern Telephone Company* v. *Am. Tel. & Tel. Co., et al.*, Civil Action No. B 75 319 (D. Conn.); *San Antonio Telephone Co., Inc.* v. *Am. Tel. & Tel. Co., Inc.*, Civil No. SA-72-CA-330 (W.D. Tex.). The order also deals with documents produced or generated in three regulatory proceedings.

[88] There is some dispute between the parties as to whether this constitutes a change in position by the government. For purposes of this appeal, it is irrelevant who is right on that issue.

New York and the Northern District of Illinois, respectively.[69]

Defendants initially contend that the order constitutes an abuse of the discovery process, relying principally on *GAF Corporation* v. *Eastman Kodak Company*, 415 F. Supp. 129 (S.D.N.Y. 1976).[70] In the course of that antitrust case Eastman Kodak produced a great many documents, several thousand of which were produced under a seal of confidentiality, and all of which—by agreement of the parties—were to be used "solely for the purposes of [that] litigation." Approximately three years after the lawsuit was begun, the Antitrust Division of the Department of Justice requested from GAF certain documents that GAF had received from Eastman Kodak by means of this discovery procedure. GAF then requested permission from the court to deliver the documents. Judge Marvin Frankel denied that request and entered a protective order prohibiting

[69] Although counsel for defendants has stated that the government's attempt to obtain documents in this manner is unprecedented, in fact the same procedure was utilized by the government, albeit without objection, in the IBM litigation. See *United States* v. *International Business Machines Corp.*, 471 F.2d 507 (2d Cir. 1972); *International Business Machines Corp.* v. *United States*, 480 F.2d 293 (2d Cir. 1973).

[70] Defendants also cite *Data Digests, Inc.* v. *Standard & Poor's Corporation*, 57 F.R.D. 42 (S.D.N.Y. 1972); *In Re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases*, 18 F.R. Serv.2d 1251 (N.D. Cal. 1974); *Aluminum Corporation of America* v. *United States Department of Justice*, 1978-1 Trade Cas. 61,824 (D.D.C. 1978); and *Martindell* v. *International Tel. & Tel. Corp.*, 72 Civ. 2609 (S.D.N.Y., March 23, 1978); *Wyly Corporation* v. *Am. Tel. & Tel. Co.*, Civil Action No. 76-1544 (D.D.C. 1978); and the two decisions in *Zenith Radio Corp.* v. *Matsushita Electric Co., Ltd.*, 1978-1 Trade Cas. 61,961 and 62,019 (E.D. Pa. 1978). In none of these cases, however, did the government seek the discovery materials as a party to and for use in ongoing litigation. See notes 72, 73, *infra*, and accompanying text.

the transfer. He noted that although there was little precedent on the issue, the circumstances of the case, including, *inter alia*, the understanding between the parties, and the lack of assurances that the Department of Justice was not seeking the documents for the purpose of bringing a criminal action against Eastman Kodak, warranted the prohibition.[71]

While such a result may well have been appropriate in the context of the *GAF* circumstances, it is by no means dictated here. In *GAF*, the government was not engaging in the discovery process as a party to that or any other litigation involving either GAF or Eastman Kodak. Quite the contrary, it sought the materials for investigatory purposes, presumably in anticipation of initiating a proceeding against Eastman Kodak.[72] Here, on the other hand, the government seeks the documents as a plaintiff in this litigation under the mechanism of Rule 34, F.R.Civ.P. As a defendant in this litigation, AT&T's duty to produce is squarely resolved by Rules 26 and 34, F.R.Civ.P., which provide for the production of relevant documents within a

[71] While Judge Frankel noted that, as a general proposition, the court should not sanction or encourage the use of private discovery to reinforce a government investigation preliminary to a civil or criminal prosecution, he was more concerned with "the use of private discovery as a possible supplement to federal grand jury proceedings." 415 F. Supp. at 133.

[72] The court was understandably concerned that, by allowing the Antitrust Division, a stranger to the litigation, to enlist the assistance of the private plaintiff, it would be adding a new and totally different method of investigation to the arsenal of devices granted to the Department of Justice by the Congress. Were the documents sought by way of a civil investigative demand (15 U.S.C. § 1312) or a grand jury subpoena, for example, there would be attendant safeguards on their production and use. By obtaining them through the good graces of plaintiff GAF, however, the government would have secured them free of the limitations that Congress saw fit to impose, and in a manner that Congress never intended.

party's possession, custody, and control. The documents here sought are, and always have been within defendants' possession, since they are defendants' own documents.[73] Conceptually it makes no difference under the Rules whether as such they represent the product of some process of selection worked out between the parties in the other actions or whether that process never took place.

Defendants here do not and cannot dispute that in the normal course of discovery in this litigation the government would be entitled to production of the same 12 million pages of documents (subject to claims of relevancy and privilege) they produced in the Litton and MCI lawsuits.[74] What plaintiff is seeking to do is to obtain some lesser number of documents, perhaps some 2.5 million,[75] by eliminating for purposes of production in this case all those which the attorneys for Litton and MCI have already determined to be

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[73] The demand here is made in the context of an ongoing civil suit which has been proceeding in this Court for some four years. Whatever may be the propriety of turning litigation records over to the government to assist it with its investigations, there can be no legitimate objection to the use of such records in another, similar action in another district, particularly where, as here, the plaintiff is claiming violations of the antitrust laws by defendants similar to those that are claimed by the private plaintiffs in the other lawsuits. See notes 79, 80, *infra*.

[74] Defendants' counsel has stated (Transcript of hearing of May 12, 1978, pp. 7-8): "We will take the microfilm, which is the selected copies of the documents that all the parties select, we will add to that all the paper we produced, that is, to those private parties, to the extent we can identify it—and by and large, 99 per cent of it, or so, we can identify; we know which files we produced—we will then produce to the government the underlying information, the document to the extent it is relevant in this case from all of this material."

[75] It is estimated that defendants produced 7 million pages of documents in the *MCI* suit from which plaintiff selected 1.5 million for copying; and 5 million pages in the *Litton* suit, from which plaintiff selected 1 million for copying.

irrelevant. The only effect of the procedure requested by plaintiff, then, is to exclude the bulk of the records from even being considered for production here. The Court can find no basis for concluding that AT&T is suffering legal injury as a result of such a narrowing of the volume of the documents to be produced.

If anyone would have a legitimate complaint concerning this procedure, it would be the plaintiffs in the private lawsuits, who could conceivably assert a work product privilege. See generally, 8 Wright and Miller, Federal Practice and Procedure, Civil, § 2021 (1974).[76] Yet, not only have these plaintiffs not asserted that privilege, but they have affirmatively agreed with the procedure proposed by the government. Defendants have cited no authority for what would appear to be a startling proposition: that they may assert a work product privilege claim on behalf of their opponents in other lawsuits.

To be sure, to the extent that the government will not need to review the millions of documents generated by AT&T at the request of the private plaintiffs and may confine itself to the more limited number of records which those plaintiffs found useful, it will ease the government's discovery burden and speed this litigation along. But defendants have no legal interest in making the government's accumulation of proof more difficult or in delaying a trial on the merits. The intricacies of common law pleading and procedure, whereby a party could, through artifice, prolong litigation or avoid adjudication on the merits, have long given way to more sensible, merit-oriented processes. As one court has noted, "one of the purposes of the Federal Rules of Civil Procedure was to take the sporting element out of litigation, partly by affording each party full access

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[76] It is, however, unclear whether the document selection process would constitute "work product" at all within the meaning of Rule 26(b)(3), F.R.Civ.P.

to evidence in the control of his opponent." *Martin* v. *Reynolds Metals Corp.*, 297 F.2d 49, 56 (9th Cir. 1961). See also *Dienstang* v. *Bronsen*, 49 F.R.D. 327, 328 (S.D.N.Y. 1969); *Hawes* v. *C.E. Cook & Co.*, 64 F.R.D. 22, 28-29, n. 3 (W.D. Mich. 1974). It would not advance but defeat the purpose of the Rules to require plaintiff in this case to proceed laboriously, and possibly at the cost of several years' delay, to duplicate the document selection process conducted by the plaintiffs in *Litton* and *MCI* when the fruits of that process are readily available and in the possession of a party to this very litigation, and when those who conducted the search do not object."

Defendants next argue that unspecified portions of the requested documents might be irrelevant to this litigation, or privileged, and that therefore the Court may not order their production until (1) the government has made specific designations of classes of documents in terms of their relevancy to this action, and (2) the defendants have screened the documents to eliminate privileged materials. These contentions will be considered *seriatim*.

As regard specificity, defendants are of course correct in their assertion that Rule 34, F.R.Civ.P., requires that a party seeking discovery frame its request in terms of specifically designated relevant documents. But it is well settled that under the Rule "even a generalized description should be sufficient when . . . the party from whom discovery is sought will have no difficulty in understanding what is wanted." Wright and Miller, *supra*, Civil, sec. 2211, p. 634; *Roebling* v. *Anderson*, 103 U.S. App. D.C. 237, 257 F.2d 615, 620 (1958); *Mallinckrodt Chemical Works* v. *Goldman, Sachs & Co.*, 58 F.R.D. 348 (S.D.N.Y. 1973). Since defendants have expressly acknowledged that they do know

[77] F.R.Civ.P. 1 provides that "these rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action."

in fact what documents they produced in *MCI* and *Litton* (see note 74, *supra*), they have no basis for their claim that the government's designation of documents is inadequately specific.

As regards relevancy, the government's request complies in substance, if not in form, with the requirements of the Federal Rules.[78]

In support of its discovery requests, the government asserts, and defendants do not deny, that the subject matter of this case virtually embraces the subject matter of *Litton* and *MCI*. A comparison of the complaint in this case (as amplified by the government's Preliminary Designation of Issues filed June 9, 1978) with the complaints filed in *Litton*[79] and *MCI*[80] reveals that none of the claims and

[78] Rule 26(b)(1), F.R.Civ.P., provides that "parties may obtain discovery of any matter, not privileged, which is relevant to the subject matter involved in the pending action."

[79] The complaints here and in *Litton* are both directed to the activities of AT&T, Western Electric, Bell Labs, and the Bell Telephone Operating Companies that are named as co-conspirators. Both actions are based on a conspiracy by defendants to restrain trade and commerce in the telecommunications equipment market: the *Litton* plaintiffs claim defendants conspired to "restrain trade and commerce in the manufacture, distribution, sale, rental, and lease of telephone terminal equipment;" the government claims defendants conspired to illegally monopolize the "terminal equipment, switching equipment, and transmission equipment" market. In both cases the critical components of the alleged conspiracy are the prohibition of interconnection with the Bell System, or its permission only with the restriction of a so-called "interface device" manufactured by Western Electric, and supplied only by Bell companies; an illegal agreement that Western Electric shall manufacture all the telecommunications equipment requirements of the Bell System, thereby restricting and eliminating competition from other manufacturers and suppliers of telecommunications equipment. See also note 80 *infra*.

[80] The complaint in *MCI* alleges that AT&T, along with the same twenty-four Bell Telephone Operating Companies involved here (and one additional company, Bell Telephone of Nevada)

issues involved in those cases is either foreign to or broader than the claims and issues raised in this case. If the government's request—instead of being couched in terms of a general request for the Litton and MCI documents—had been stated expressly in terms of the precise issues, claims, and transactions in those cases, defendants could hardly be heard to complain that the designation of documents was insufficient in terms of relevancy.

The only substantial difference between the claims and issues involved in the government's case here on the one hand, and those involved in the *Litton* and *MCI* cases on the other hand, is that the former subsume the latter. In effect, *Litton* and *MCI* each represent a separate and identifiable segment of the government's case here. Thus, *a fortiori*, the documents relevant to those actions would be relevant here; their relevancy is further assured by their having

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conspired to prevent plaintiffs, who are specialized communications common carriers, from interconnecting in the intercity telecommunications services market; that they provided for interconnection in that market only upon discriminatory terms and conditions; and that they refused to allow plaintiffs to utilize AT&T's most efficient equipment and facilities. Similarly, the complaint here alleges that defendants and their co-conspirators conspired to monopolize the market of "intercity private line service for the transmission of voice, data, facsimile, audio and video programming, and other telecommunications," by *inter alia* attempting to obstruct and obstructing the interconnection of specialized common carriers with the Bell System; and that they used their monopolistic position to deter "would be competitors" in that market "by refusing to deal with them . . . or did so only on highly discriminatory terms and conditions." Both plaintiffs allege that in furtherance of the conspiracies, defendants abused the administrative process by filing "sham tariffs;" engaged in predatory and exclusionary pricing tactics and "tracking" of competitors (offering to provide services in the same areas as private systems but at substantially lesser rates); and refused to provide access for private systems to utilize Bell System facilities. Thus the parties, the critical components, and the activities that each plaintiff purports to rely on to demonstrate the conspiracy are essentially the same in both cases.

been thoroughly screened for relevancy in the private actions.

To be sure, neither the confluence of issues in the private lawsuit with those in this lawsuit, nor the findings of relevancy made in those private actions, are determinative, and some of the documents produced by AT&T in *Litton* and *MCI* may ultimately be found to be outside the range of relevancy within the meaning of this action. But the discovery rules do not require absolute precision, and no order of production can serve as a guarantee that every document produced will be relevant.[81] If the purposes of the Rules, and of pretrial discovery generally are to be effectuated, actual discovery must be expected to be somewhat of a "fishing expendition,"[82] particularly in antitrust and similarly complex litigation.[83]

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[81] As Judge Irving Kaufman has pointed out (Kaufman, Judicial Control Over Discovery, 28 F.R.D. 111, 119 (1961)); "The clear policy of the rules is toward full disclosure. At the early stages of litigation, it is rare that a showing can be made that a particular item of requested information is not 'relevant' under the broad definition given that word in Rule 26. In the ordinary case, the judge will order the question to be answered, subject to a later finding of irrelevancy. . . ." See also, *Metal Foil Prod. Mfg. Co.* v. *Reynolds Metals Co.*, 55 F.R.D. 491, 493-4 (E.D. Va. 1970); *E.I. duPont de Nemours* v. *Deering Milliken Research Corp.*, 72 F.R.D. 440, 442-3 (D. Del. 1976); *Horizons Titanium Corp.* v. *Norton Co.*, 290 F.2d 421, 425 (1st Cir. 1961); *Patterson Oil Terminals, Inc.* v. *Charles Kurz and Co.*, 7 F.R.D. 250, 251 (E.D. Pa. 1945); *Heiner* v. *North American Coal Corp.*, 3 F.R.D. 63 (W.D. Pa. 1942).

[82] *Hickman* v. *Taylor, supra*, 329 U.S. at 507-8; *Laverett* v. *Continental Briar Pipe Co., Inc.*, 25 F. Supp. 80, 82 (E.D.N.Y. 1938); *Mattson* v. *Cuyuna Ore Co.*, 178 F. Supp. 653, 654 (D. Minn. 1959); see also Advisory Committee Report, 5 F.R.D. 433, 454 (1946); *Harris* v. *Nelson*, 394 U.S. 289, 297 (1969); *Democratic National Committee* v. *McCord*, 356 F. Supp. 1394, 1396 (D.D.C. 1973); see generally, Wright and Miller, *supra*, Civil, sec. 2007.

[83] See, *e.g.*, *United States* v. *International Business Machines Corp.*, 66 F.R.D. 180 (S.D.N.Y. 1974); *Goldlinger* v. *Boron Oil*

It is difficult to envision what prejudice could ensue from the production of documents, a small number of which might turn out not to be relevant to this lawsuit. To the extent that any irrelevant documents are produced, defendants will be amply protected by this Court's protective order, which will maintain the confidentiality of all documents produced, and order the return of any irrelevant documents to the defendants.[84]

Co., 60 F.R.D. 562 (W.D. Pa. 1973); *Parion Theatre Corp.* v. *RKO Theatres, Inc.*, 319 F. Supp. 378 (S.D.N.Y. 1970); *G. & P. Amusement Co.* v. *Regent Theater Co.*, 9 F.R.D. 721 (N.D. Ohio 1949).

[84] It is also noteworthy that the documents in question were produced to the plaintiffs in the private lawsuits in bulk, without any concern for relevancy or privilege, and with provision for determination of these matters only subsequent to production. Defendants have suggested that such a free and open attitude was appropriate to the parties in the private cases because (1) those parties, unlike the government, could be trusted not to "leak" material to unauthorized persons, and (2) strong protective orders were issued in those cases. This Court has issued a protective order (Pretrial Order No. 7) which guarantees defendants' rights at least as securely as did the protective orders in *MCI* and *Litton;* and, the Court is prepared to impose such additional safeguards as may, from time to time, appear reasonably necessary to protect defendants' interests in this regard. The Court cannot accept the proposition that government counsel will be more likely than others to violate those protective orders and to reveal materials the disclosure of which is prohibited. Further, defendants' contention that the Publicity in the Taking of Evidence Act, 15 U.S.C. § 30, will somehow hamper the Court's ability to provide protection for privileged documents is unfounded. See *United States* v. *United States Fruit Company*, 410 F.2d 553, 555-56 (5th Cir. 1969). The Act provides only that depositions taken pursuant to a Sherman Act claim brought by the United States are to be conducted in public, and has no bearing on the government's right to obtain documents. If and when the government properly raises the issue of production of deposition transcripts from the two private cases (see note 91, *infra*), the Court will hear from the parties as to the possible effects of the Act in that context.

This Court is not required to compel plaintiff to engage in a time-consuming reenactment of the discovery process engaged in by the *Litton* and *MCI* plaintiffs, with the result that eventually, that is, several years later, essentially the same documents will be produced. The Court clearly has the authority under the Federal Rules to order production of documents which are—on any reasonable interpretation of that concept—relevant, and through a process which fully protects the legitimate interests of defendants.[85] There is no basis in the law or common sense to prescribe the more cumbersome procedure.[86]

This, then, leaves only defendants' claims as to privilege. In this regard, defendants are entitled to a mechanism (1) for honoring appropriate claims of privilege and (2) for insuring, by means of an appropriate protective order, that any privileged documents produced to plaintiff will not be used improperly. On December 16, 1976, the parties stipulated to and the Court approved such a mechanism in this proceeding in Pretrial Order No. 7. This order is presently in full force and effect, and provides, *inter alia*, that:

> WHEREAS, the need for prompt and orderly discovery is not inconsistent with the ability of parties to make some examination to determine whether docu-

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[85] See *Huff* v. *N.D. Cass Co. of Alabama*, 468 F.2d 172 (5th Cir. 1972); *Bell* v. *Swift & Co.*, 283 F.2d 407 (5th Cir. 1960) (trial judge's rulings on discovery matters will not be disturbed in the absence of "substantial prejudice.") See generally, *Rodgers* v. *United States Steel Corp.*, 536 F.2d 1001, 1006 (3rd Cir. 1976); *Galella* v. *Onassis*, 487 F.2d 986 (2d Cir. 1973).

[86] Defendants' contention that requiring them to turn over these documents to plaintiff places them at a discovery disadvantage is without merit. AT&T is also the defendant in the *Litton* and *MCI* cases, and as such, has had the same opportunities for discovery as did the private plaintiffs in those suits. To be sure, some of AT&T's discovery in the private suits may not prove useful to it in this case but, of course, some of *MCI's* and *Litton's* discovery may not be of use to the government either.

ments and other discovery materials are protected, privileged, or work product, but may make it impossible for them to conduct such examination on a sufficiently thorough basis to ensure that their rights are fully protected with respect to such documents and other discovery materials. . . .

* * *

NOW IT IS HEREBY ORDERED THAT:

* * *

3. All documents and other discovery materials encompassed within any document request or interrogatories as to which a claim of privilege or work product is asserted by any party shall be regularly referred at reasonable intervals to the Special Master during the production of documents for a decision as to whether or not said documents or materials must be produced and under what conditions.

4. The production of any document or other discovery material by plaintiff or defendants under this Order shall be without prejudice to any subsequent claim that such material is immune from discovery by reason of law or statute, privileged under Rule 26 of the Federal Rules of Civil Procedure, or protected from discovery as work product within the meaning of Rule 26 of the Federal Rules of Civil Procedure; and no party shall be held to have waived any such rights by such production. Any document or other discovery material produced to an opposing party with respect to which a claim of privilege or work product is subsequently made shall be returned forthwith to the Special Master for determination of the legitimacy of the claim and all copies thereof shall be returned to the party producing the same.

The order expressly contemplates that "because of a need for prompt and orderly discovery" not all claims of

privilege will be asserted prior to or at the time documents are produced, and it therefore reserves to the parties the right to assert claims of privilege in appropriate instances subsequent to production. It further provides a comprehensive scheme for treatment of privileged documents that fully protects against their improper use or disclosure by either party. Inasmuch as there is presently a clear need for prompt and orderly discovery, this stipulation and order would seem to have been tailored for precisely the situation in which the parties find themselves now.

Accordingly, the Court has this day entered Pretrial Order No. 11 which requires defendants to produce by November 1, 1978, all of the approximately 2.5 million documents produced by them in *Litton* and *MCI* and selected for use by those private plaintiffs. Documents as to which defendants wish to assert a claim of privilege are to be segregated [87] and delivered to the Special Masters by that date.[88] To the extent that defendants are unable to determine by that date all claims of privilege they wish to assert, they shall, in the manner prescribed in Pretrial

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[87] Since defendants have claimed that segregating some privileged material from non-privileged material will be impractical or impossible due to the fact that the government has requested the material be produced in the form of microfilm, they may produce documents in their original form where they determine that to be necessary. However, such determinations are to be made in good faith, and production of documents in their original form is to be the exception and not the rule. The Court notes in that regard that in the *IBM* litigation, under almost identical circumstances, the defendant was able to remove documents which it was claimed were privileged from the reels of microfilm delivered to the government. See Note, "Ancillary Pretrial Orders," 73 Colum. L. Rev. 1660, 1661 (1973).

[88] Those documents which were ruled to be privileged in *MCI* and *Litton*, either by Special Masters in those cases or otherwise, will be segregated and deemed provisionally privileged here until such time as the Special Masters in this case rule on their status in accordance with standards of privilege established in this case.

Order No. 7, deliver the documents to plaintiff and assert appropriate claims of privilege subsequently.[89] Pretrial Order No. 11 further directs plaintiff to bring this Order to the attention of the U.S. District Court for the Southern District of New York and the U.S. District Court for the Northern District of Illinois, and to request leave [90] from those courts for the production of such documents notwithstanding any protective orders that may have been entered therein.[91]

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[89] Since defendants have repeatedly indicated to the Court that all confidential and privileged documents produced by them in *Litton* and *MCI* were specially marked with a confidential legend, segregation of most—if not all—of the documents requested here should be possible by the date indicated. Moreover, defendants have the benefit of the rulings of Special Masters in those cases to assist them in determining which documents should be claimed as privileged here.

[90] While technically such leave may not be required inasmuch as defendants are merely being ordered to produce documents relevant to this lawsuit which are in their possession and control, as a matter of comity and courtesy the procedure described herein should be followed.

[91] Although the government has not completely abandoned its request for documents from the remaining five private actions and the three regulatory proceedings to which AT&T is a party, it has concentrated its efforts on those produced in *Litton* and *MCI*. The parties have essentially briefed and argued the issue only with respect to these two proceedings, and the Court has not been made aware of either the protective order situations or substantive issues involved in the other proceedings. Accordingly, the present orders are limited to the two civil actions which have generated the bulk of this kind of discovery sought by plaintiff. Should the government desire to press its request for documents produced in other private lawsuits or regulatory proceedings, it may do so by special application showing the precise circumstances which establish the appropriateness and necessity of ordering their production. Insofar as copies of the depositions taken in any of the private lawsuits (including *Litton* and *MCI*) and the documents attached to the depositions, are concerned, considerations other than those which pertain to the documents may well be present yet the government has made no effort to provide the Court with either a legal or factual basis on which to order their production. With respect to the depositions, therefore, the government's request is likewise denied without prejudice to a subsequent submission of an appropriately-supported application.

IV

The complaint herein was filed in November of 1974, and the answer in February of 1975. During the three and one-half years since then, all proceedings were effectively halted for a total of 31 months, first by a stay issued by this Court on February 27, 1975, which expired on December 16, 1976, and then by two stays issued by the U.S. Court of Appeals (while defendants were proceeding by way of writ of certiorari from the Court's order of November 24, 1976)—from January 25, 1977, to May 27, 1977, and from August 11, 1977, to November 28, 1977. During the infrequent periods—lasting no more than a few months at a time—when the proceedings were not under a stay order, relatively little discovery was being carried on. Thus, in spite of its age, this case has not come close to going to trial.

The delays until now, while certainly regrettable, cannot be regarded as either purposeful or unnecessary. In view of the importance of the issues involved, the defendants had the right to seek review of the rulings of this Court from appellate tribunals; the stays ordered by this Court and the U.S. Court of Appeals were appropriate to preserve the status quo; and the slowdown of discovery activities cannot be regarded as unexpected while significant issues having a potentially decisive bearing upon the proceedings in this case were under consideration. Thus, while the parties in their respective memoranda submitted to this Court in anticipation of the status hearing on August 21, 1978, have repeatedly, and with perhaps unnecessary acerbity, blamed each other for intentional de-

laying tactics, the Court has neither desire nor cause to cast blame upon either party for the delays that have occurred until the present.

However, in view of the Court's decision today on all major outstanding issues, the time is ripe for sketching out a procedural plan to move this litigation expeditiously along toward its disposition without doing violence to the legitimate rights of the parties. Defendants point out in their reply to the government's status memorandum that delay in this case "is an incredible burden to the Bell System involving as it does a cloud over its entire future existence and the need to divert vast resources, both in the form of financial expenditures and in the diversion of personnel critically needed in the provision of service to the public." [92] Likewise, if the goverment's charges of a vast and unlawful monopoly in the telephone and telecommunications area are correct, it, and the public, have an interest in seeing to it that appropriate remedial action is taken at the earliest opportunity.

The complaint, as defendants have pointed out, is sweeping, broad, and vague. This has not only had the effect of making it difficult for defendants to formulate their defenses,[93] but it has also been an obstacle to discovery. Absent greater precision and specificity with respect to the government's claims, discovery is likely to remain so unfocused as to be both unduly expensive and unmanageable. Moreover, it is generally agreed that one key to the swift disposition and firm management of cases such as

[92] Status Memorandum, p. 43, footnote.

[93] To date, the government has done nothing more than to file a Preliminary Designation of Issues, on June 9, 1978, which provided, in the government's own words, "a brief, preliminary and somewhat tentative overview of the 'issues' before the court."

this is a narrowing of the issues.[94] Thus, it is essential that this relatively amorphous complaint be shaped as quickly as possible into specific allegations, and that a continuing mechanism be established for identifying and narrowing the issues and specifying the evidence to be relied upon by both plaintiff and defendants.

After considering defendants' request for greater specificity,[95] plaintiff's offer to submit a preliminary order of proof,[96] and the need for expeditious processing of this litigation and an appropriate limitation on discovery, an order to govern pretrial proceedings (Pretrial Order No. 12)[97] is being entered this date.[98]

[94] See, *e.g.*, Moore's, *supra*, *Manual for Complex Litigation*, para. 1.20; J. Withrow and R. Larm, *The "Big" Antitrust Case: 25 Years of Sisyphean Labor*, 62 Cornell L. Rev. 1, 42-3 (1976); Comment, *Federal Civil Procedure—Federal Rule 16—Definition of Issues by the Pre-Trial Judge*, 61 Mich. L. Rev. 1566 (1963); Comment, *The Role of the Court in Simplifying the Triable Issues at Pretrial Conference*, 72 Yale L. J. 383 (1962); Proceedings of the Seminar on Protracted Cases, 21 F.R.D. 395 (1958).

[95] Defendants have repeatedly requested greater specification of the charges against them, and while their requests have generally been made in the context of the jurisdictional issue, now disposed of in Part I, *supra*, the principle of such a specification is sound.

[96] The government has stated that to sharpen the issues, it will be prepared to submit what it refers to as a preliminary order of proof (although it is not quite clear what it means to include in that order of proof), and the Magistrate included a requirement for the submission of such a document in his Discovery Order No. 2.

[97] This order may be regarded as only the first of several directions from the Court concerning pretrial procedures. It is expected that, as discovery proceeds, additional orders will be entered, upon the Court's own motion or at the suggestion of the parties, to further simplify and streamline this case.

[98] The order is based on the Court's authority under Rules 16 and 26, F.R.Civ.P. At the same time, the Court recognizes that in a lawsuit of this magnitude, pretrial mechanisms must not merely follow the literal language of the Rules but should also take ac-

In essence, that order provides that the parties shall file four successive Statements of Contentions and Proof over the next eighteen months, each to become progressively more specific than the last, and each to be followed by a special pretrial conference. The filing of the final statements shall signal the close of discovery.

Thus, by November 1, 1978, plaintiff shall file a Statement of Contentions and Proof, in which it shall describe, with specificity, each of the government's legal and factual contentions, including the activities of the defendants it expects to rely upon to prove its charges of violation of Section 2 of the Sherman Act. Under the heading of each factual contention, the statement shall list the witnesses and the documentary and other evidence [99] which will be used to support the claim that such activity was carried on to effect unlawful combinations in violation of the antitrust laws, or which will otherwise support the allegations of the complaint. The statement shall describe the extent to which such evidence is presently in the possession of the plaintiff, or where, in the government's view, it may be found.

Defendants shall then have until January 1, 1979, to file their first Statement of Contentions and Proof in which they shall state their factual and legal contentions in response to plaintiff's claims, the factual and legal basis

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count of the logistics of dealing with proof of potentially enormous proportions. See also, *Rosden* v. *Leuthold*, 107 U.S. App. D.C. 89, 274 F.2d 747 (1960); *Buffington* v. *Wood*, 351 F.2d 292 (3rd Cir. 1965); *Davis* v. *Duplantis*, 448 F.2d 918 (5th Cir. 1971); *Walker* v. *West Coast Fast Freight, Inc.*, 233 F.2d 939 (9th Cir. 1956). See also, *United States* v. *E. I. duPont de Nemours & Co.*, 10 F.R.D. 618 (D. Del. 1950); *Gaylord Shops* v. *South Hill Shoppers City*, 33 F.R.D. 303 (W.D. Pa. 1963).

[99] Except for massive documentary evidence supporting particular contentions which may be referred to generally, all evidence is to be described in specific terms.

for their affirmative defenses, if any, and the documentary or other proof they exepct to rely upon in support of each factual contention. Defendants' statement shall be organized in a manner similar to that of plaintiff and it shall be similarly detailed.

Within thirty days thereafter, a special pretrial conference [100] shall be held before the Magistrate [101] in accordance with Rule 16, F.R.Civ.P. and 28 U.S.C. § 636, for the principal purposes of narrowing and simplifying the issues,[102] arriving at stipulations of uncontroverted facts, and reducing further unnecessary discovery.[103]

Each of the parties shall file three additional Statements of Contentions and Proof, and three additional special pretrial conferences shall be held successively thereafter, as follows. The government shall file its second, third, and fourth statements by April 1, 1979, October 1, 1979, and April 1, 1980; defendants shall file their second, third, and fourth statements by May 1, 1979, November 1, 1979, and

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[100] This will be first of four special pretrial conferences to be held in addition to routine pretrial conferences and meetings.

[101] The Magistrate will be expected to keep the Court advised concerning the pretrial conferences and the progress of discovery which he will direct and monitor. See generally, Note, *Masters and Magistrates in the Federal Courts*, 88 Harv. L. Rev. 779, 802, n. 147 (1975).

[102] Including such matters as limitations on the scope and the period of inquiry. See Prettyman Report, 13 F.R.D. 62, 73-4 (1952).

[103] See *Dolgow* v. *Anderson*, 53 F.R.D. 661, 664 (E.D.N.Y. 1971); *Life Music, Inc.* v. *Edelstein*, 309 F.2d 242 (2d Cir. 1962); A. Ridge, *The Organization of the Big Case*, 21 F.R.D. 406 (1957); Manual for Complex Litigation (Moore's Fed. Practice, 1977), para. 0.40.

April 1, 1980;[104] and special pretrial conferences shall be held on or about June 1, 1979, December 1, 1979, and May 1, 1980.[105] Some of these pretrial conferences, particularly the later ones, may be conducted by the Court rather than the Magistrate. On April 1, 1980, contemporaneously with the submission of the final statements, all discovery shall be closed.

If the issues are to be narrowed and this case is to be brought to trial within a reasonable period of time, it is essential that the parties be bound by their Statements of Contentions and Proof. Accordingly, after a party has filed a statement, it will be restricted to discovery within the limitations of the issues identified by that statement and the contemporaneous opposing statement. Likewise, with the exceptions noted below, subsequent statements may not enlarge upon or add to contentions previously made, and they will have as their purpose not the inclusion of matters neglected or overlooked in earlier statements, but the further narrowing and tightening of matters in dispute between the parties.

Discovery will also be restricted to data relevant to proof of propositions which are material, as distinguished

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[104] At the present stage of the proceedings, defendants may be expected to require some time to respond to the government's contentions. As discovery proceeds and the issues become more clearly defined, defendants will appropriately be able to submit their statements more or less contemporaneously with those filed by plaintiff.

[105] This schedule does not preclude the entry of orders for filing additional Statements of Contentions and Proof, or any other mechanisms for further narrowing the issues and limiting discovery. The Court will employ the sanctions available under Rule 37, F.R.Civ.P., and 28 U.S.C. § 1927, to insure prompt compliance with the pretrial procedures specified herein and in the accompanying orders. See generally Edelstein, *The Ethics of Dilatory Motion Practice: Time For Change*, 44 Fordham L. Rev. 1069 (1976).

from merely generally relevant conduct, periods of time, or areas (see *Carlson Companies, Inc.* v. *Sperry & Hutchinson Co.*, 374 F. Supp. 1080, 1101 (D. Minn. 1974); *Professional Adjusting Systems of America, Inc.* v. *General Adjustment Bureau, Inc.*, 373 F. Supp. 1225, 1229 (S.D. N.Y. 1974); *Dolgow* v. *Anderson, supra*), and proof at trial will be limited to the issues framed by the final statements and the last pretrial order.[106]

To be sure, in the early stages of this process the parties may not be able to be fully definitive as to either the evidence or the specific contentions that will be based on that evidence.[107] Accordingly, upon leave of the Magistrate, which will be freely granted with respect to a request based upon new discovery, the second statement may enlarge upon the first, either by broadening existing contentions or by adding new contentions. Cf. Rule 15, F.R. Civ.P.[108] Thereafter, however, the burden to justify a departure from previous statements shall become progressively heavier. After the parties file their second statements, an enlargement will be allowed only upon good cause shown, and after the third statements are filed, any amendment, other than by way of limitation, will be

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[106] See, generally, Handbook of Recommended Procedure for the Trial of Protracted Cases, 25 F.R.D. 351, 386-390 (1960); A. Dawson, The Place of the Pleading in a Proper Definition of Issues in the "Big Case," 23 F.R.D. 430 (1958); A. Ridge, *The Organization of the Big Case, supra*, note 98; 1 Moore's Federal Practice, *supra*, Manual for Complex Litigation, para. 1.20, 1.80, 2.30, 2.40, 3.30, 3.60, 4.20, 4.57 (1977); 3 Moore's Federal Practice, *supra*, para. 16.20 (1977).

[107] The Court notes, however, that counsel for the government stated during the oral argument on August 21, 1978, that he expects no broadening of the issues whatever after the first "order of proof" is filed.

[108] Similarly, prior to the filing of the second statement, discovery will not be restricted by the parameters of the issues defined by the first statement.

granted only to prevent "manifest injustice". *Shuber* v. *S.S. Kresge Co.*, 458 F.2d 1058 (3rd Cir. 1972); *Solar Fuel Co.* v. *United Mine Workers*, 346 F. Supp. 789 (W.D. Pa. 1972); 3 Moore's Federal Practice, *supra*, p. 1620; and see generally, J. Withrow and R. Larm, *The "Big" Antitrust Case: 25 Years of Sisyphean Labor*, *supra*, 62 Cornell L. Rev. at 26. These procedures will be enforced and administered to achieve a narrowing of the issues,[109] to apprise opponents and the Court of the status of the case, and to effect appropriate limitations on discovery.

To a substantial extent, the development of discovery and the definition and clarification of issues present a classic "chicken and egg problem," *i.e.*, "to be manageable, discovery ought to be confined to framed issues, but to be framed carefully, issues must be based on concrete knowledge." Antitrust Commission, *Briefing Paper on Expediting Complex Antitrust Cases*, p. 15; 62 Cornell L. Rev., *supra*, at 27. The authorities differ on how this dilemma should be resolved, that is, in what sequence and by what methods discovery and issue definition should take place. Some writers advocate that, in order to avoid the unnecessary production of documents and the taking of depositions which ultimately may not prove to be helpful, all discovery should be stayed until the issues have been clearly specified. See, *e.g.*, 21 F.R.D. 395, et seq., Handbook of Protracted Cases (1958); R. McLaren, *Procedure in Private Antitrust Cases*; 21 F.R.D. 440, 446-47 (1957); and see generally, R. Savage, *Limiting Discovery and Definition of Issues*, 23 F.R.D. 456, 457-60 (1958). The highly respected Manual for Complex Litigation, on the other hand, takes the position that the issues cannot be defined until all discovery has more or less been completed; 1 Moore's Federal Practice, *supra*, para. 1.20; 1.70.

[109] See *Life Music, Inc.* v. *Broadcast Music, Inc.*, 31 F.R.D. 3 (S.D.N.Y. 1962); *Brinn* v. *Bull Insular Lines, Inc.*, 28 F.R.D. 578 (E.D. Pa. 1961).

In my judgment, in a suit of this magnitude it would be self-defeating either to let discovery continue on an almost unlimited basis, until the parties are prepared fully to define the issues, or to freeze discovery indefinitely in the illusory hope that the parties—without the benefit of discovery—will somehow acquire the capability to give concrete shape to the generalized issues raised by the complaint and the answer. Either course can lead only to procrastination. The short of the matter is that "the need to settle every conceivable dispute and to have every conceivable theory and fact presented must be balanced by the need for final resolution." 62 Cornell L. Rev., *supra*, at 24.[110] The procedures specified herein are designed to move the case along while seeking to escape the adverse consequences inherent in the several contending methods of handling the pretrial process. Discovery and issue definition will go hand in hand. Initially this will entail a certain amount of discovery that will have to be disregarded later—but as the issues are narrowed further, less and less irrelevant discovery should take place. Concomitantly the ongoing discovery process should provide the information necessary to narrow the issues.

If mutually fair, appropriately complete, and expeditious discovery is to be effected, and if the real issues are to emerge at an early date, it is essential that the parties cooperate in good faith with each other, the Magistrate, the Special Masters, and the Court. Counsel will be ex-

[110] See also, *United States* v. *Standard Oil Company (New Jersey)*, 23 F.R.D. 1 (S.D.N.Y. 1958). In that complex antitrust case, the court ruled that discovery should proceed to the extent necessary to provide sufficient information for a narrowing of the issues, noting that "[a]fter such preliminary narrowing, the balance of discovery can be measured against the frame of reference of the issues, as so narrowed, rather than against the broad frame of reference of the complaint which is the only one presently available. After the narrowing of the issues, much of the production might be determined to not be necessary." 23 F.R.D. at 4.

pected to meet informally with each other whenever appropriate to attempt to iron out discovery disputes, and only when controversies are so genuine and substantial that they cannot be resolved informally shall they be submitted to the Court.[111]

The parties are in agreement that the details of discovery must be closely supervised by a judicial officer if this case is to move expeditiously to a disposition on the merits. There is some difference of opinion as to whether these supervisory functions would best be exercised by the Court, the Magistrate, or the Special Masters and, indeed, to what extent some of these functions have previously been delegated to the Magistrate and the Special Masters.

An order issued by the Court on February 7, 1978, provides in part that "the Court . . . will assign the case to Magistrate Margolis to direct the preparation of the pretrial discovery schedule and to perform such additional duties with respect to discovery and other matters as the Court may direct pursuant to 28 U.S.C. § 636(b) and Local Rules 3-8 and 3-9."

The government has construed this order to mean that all discovery matters in this case were referred to the Magistrate for ongoing supervision and review, and Magistrate Margolis, as his Discovery Order No. 2 bears out, shares this view. Defendants, on the other hand, understand the February 7, 1978, order to mean that, except for the preparation of a discovery schedule, the Magistrate has no authority with respect to discovery or any other pretrial matters. Defendants recommend instead that the Special Masters, appointed pursuant to Pretrial Order No. 7, be

[111] In some jurisdictions, local rules explicitly provide that counsel shall discuss their discovery differences before bringing them to the court. See, *e.g.*, D.C. Cal. R. 3(1); D. Minn. R. 5; see generally 62 Cornell L. Rev., *supra*, at 30.

utilized for resolving discovery disputes likely to arise in this case.

This Court concurred with Judge Waddy when he designated Professors Rice and Hazard to serve as Special Masters. Under the order of reference, they have the responsibility for ruling on all claims of work product and other privilege asserted during the course of discovery. The Court is fortunate that these distinguished scholars have agreed to undertake this task, and it is fully committed to support them in the exercise of their duties.[112]

At the same time, it appears that broadening the responsibilities of the Special Masters to include ruling on all discovery disputes, as suggested by defendants, would be inappropriate. The Special Masters will have an enormous responsibility, with respect to both volume and sensitivity, in passing upon claims of privilege advanced by defendants and many government departments. Moreover, each of the Special Masters is carrying a full teaching load, while the Magistrate has no additional responsibilities other than those arising out of litigation in this Court. The Magistrate, unlike the Masters, has his office in this courthouse where he may be deemed to be available both to the parties and to this Court at all times.[113] Further, the legislation creat-

[112] A dispute has arisen between the parties concerning the appropriate division of expenses with respect to the work of the Masters and their staffs, with the government taking the position that it should not be responsible for costs to the same extent as defendants. The Court has entered an order (Pretrial Order No. 9) requiring the parties to bear costs equally pending a further order at some future date when, because of a disposition on the merits, an allocation of workload, or otherwise, a different distribution of costs is appropriate.

[113] Professor Rice is a Professor of Law at Washington College of Law, American University in Washington, D.C.; Professor Hazard is a professor of Law at Yale University School of Law in New Haven, Connecticut. At least for the time being, their staffs for purposes of this litigation will be located in Bethesda, Maryland.

ing the post of Magistrate contemplated that persons occupying the position would undertake precisely such responsibilities.[114]

For these reasons, the Magistrate is hereby designated to supervise pretrial discovery and to consider and deal with all discovery disputes, other than those matters which by Pretrial Order No. 7 have been delegated by the Court to the Special Masters, and except as may hereafter be ordered otherwise by the Court. In order to clarify the Magistrate's duties, responsibilities, and authority, the Court is contemporaneously herewith issuing Pretrial Order No. 13, which more precisely than the order of February 7, 1978, delineates the Magistrate's powers with respect to this litigation.

Discovery should proceed expeditiously in accordance with the schedule established herein and in conformity with the Statements of Contentions and Proof and the pretrial conferences to be held at six-month intervals. In the meantime, disputes concerning privilege will be resolved by the Special Masters, and all other discovery disputes by the Magistrate. This Court will be available to meet with and to assist the Magistrate, the Special Masters, and the attorneys for the parties during the pretrial period.

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[114] See, Report of the Committee on Procedure in Antitrust and Other Protracted Cases, 13 F.R.D. 62 (1951); Yankwich, "Short Cuts in Long Cases," 13 F.R.D. 41, 83 (1951); Federal Magistrates Act, 28 U.S.C. § 631-639, and see, Note, Masters and Magistrates in the Federal Courts, *supra*, 88 Harv. L. Rev. at 799.

Important substantive issues are raised in this action, and the parties are entitled to a judicial process which will fairly, impartially, and expeditiously resolve these issues. It is the Court's purpose to provide them with such a process.

/s/ HAROLD H. GREENE
Harold H. Greene
United States District Judge

September 11, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1698

UNITED STATES OF AMERICA, *Plaintiff*,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY; WESTERN ELECTRIC CO., INC.; BELL TELEPHONE LABORATORIES, INC.; *Defendants.*

Pretrial Order No. 10

(Filed September 11, 1978)

Upon consideration of defendants' requests to obtain discovery under Rule 34, F.R.Civ.P., from various government departments and agencies, and the legal arguments of the parties with respect thereto, and in accordance with this Court's opinion of today, it is this 11th day of September, 1978,

ORDERED That for purposes of discovery under the Federal Rules of Civil Procedure the plaintiff in this case shall consist of the United States Department of Justice and all other agencies, departments, and subdivisions of the Executive Branch of the United States government, but shall not include the Federal Communications Commission and other independent regulatory agencies, or the United States Postal Service, and it is further

ORDERED That the Attorney General or his agents in the United States Department of Justice, as counsel for plaintiff, shall bring this order to the attention of all agencies, departments, and other subdivisions of the Executive Branch of the United States government from which defendants have heretofore sought discovery, and shall assist them with the discharge of their obligation to comply with

appropriate discovery requests heretofore or hereafter made by defendants.

/s/ HAROLD H. GREENE
Harold H. Greene
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1698

UNITED STATES OF AMERICA, *Plaintiff*,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY; WESTERN ELECTRIC CO., INC.; BELL TELEPHONE LABORATORIES, INC., *Defendants.*

Pretrial Order No. 11

(Filed September 11, 1978)

Upon consideration of defendants' appeal from paragraph 3 of the Magistrate's Discovery Order No. 2, and of plaintiff's and defendants' proposed Pretrial Orders No. 10, the Court having considered the memoranda and the oral arguments of the parties, it is this 11th day of September, 1978, in accordance with the Court's opinion of today, ORDERED:

1. By November 1, 1978, defendants shall produce to plaintiff for inspection and copying in their entirety, all microfilm or microfiche copies of documents (or, if the documents are not on microfilm or microfiche, other copies of the documents) which were heretofore produced by the defendants and selected for use by the plaintiffs in *Litton Systems, Inc.* v. *American Telephone and Telegraph Co.*, CA No. 76 Civ. 2512 (S.D.N.Y. 1976), and *MCI Communications Corp.* v. *American Telephone and Telegraph Co.*, Civil No. 74 C 633 (N.D. Ill. 1974).

2. In the event that defendants wish to assert claims of privilege concerning any of the above-described documents, and they are capable of segregating such documents from

those required to be produced pursuant to paragraph 1 above, they may withhold production of documents so segregated to plaintiff by delivering them to the Special Masters on or prior to November 1, 1978, for determinations as to such claims of privilege. All other documents shall be produced to plaintiff by November 1, 1978, but defendants shall retain the right subsequently to assert appropriate claims of privilege with respect to such documents in the manner prescribed in paragraph 4 of Pretrial Order No. 7.

3. Defendants may also segregate any documents which have heretofore been ruled to be privileged in the actions referred to in paragraph 1 above, and deliver them to the Special Masters by November 1, 1978. Such documents will be deemed provisionally privileged and their production held in abeyance, except as the parties may agree otherwise, until such time as the Special Masters rule on their status in accordance with the standards established in this case.

4. Plaintiff shall bring this order to the attention of the courts in which *Litton Systems, Inc.* v. *Am. Tel. & Tel. Co.* and *MCI Communications Corp.* v. *Am. Tel. & Tel. Co.* are pending, and request leave of those courts to effect such production notwithstanding any protective orders which may have been entered therein.

5. In accordance with the representations of plaintiff, any additional documents heretofore produced by the defendants but not selected by the plaintiffs in the actions referenced in paragraph 1 above, shall be subject to production in this action only by special leave of the Magistrate upon good cause shown.

6. The provisions of Pretrial Order No. 7 shall be fully effective with respect to documents produced pursuant to this order, provided, however, that upon a showing of reasonable cause, a party may seek from the Court such additional protective orders as may be appropriate to insure

confidentiality of the documents produced pursuant to this order.

/s/ HAROLD H. GREENE
Harold H. Greene
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1698

UNITED STATES OF AMERICA, *Plaintiff*,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY; WESTERN ELECTRIC CO., INC.; BELL TELEPHONE LABORATORIES, INC., *Defendants.*

Pretrial Order No. 12

(Filed September 11, 1978)

Upon consideration of defendants' appeal from the Magistrate's Discovery Order No. 2, the Court having heard oral argument and considered the memoranda submitted by the parties, and it appearing that procedures must be established which will assure the progress of discovery in a fair, mutual, and expeditious manner, it is this 11th day of September, 1978, in accordance with this Court's opinion of today,

ORDERED That pretrial proceedings and discovery shall hereafter proceed as follows:

1. Each party shall file four successive Statements of Contentions and Proof, in accordance with the following schedule: the plaintiff shall file its statements on or before November 1, 1978, April 1, 1979, October 1, 1979, and April 1, 1980; and the defendants shall file their statements on or before January 1, 1979, May 1, 1979, November 1, 1979, and April 1, 1980.

2. Each of plaintiff's statements shall list and describe with particularity (a) each legal argument upon which plaintiff intends to rely at trial, together with appropriate statutory references, case law, and other citations, (b) each

factual contention it intends to advance at trial, (c) under each factual heading, a list of the witnesses and the documentary and other evidence which plaintiff will use to support that contention, (d) whether such evidence is presently in plaintiff's possession, and if not, where in its view it may be found, and (e) the relief plaintiff expects the Court to grant with respect to each defendant in the event it proves its case against that defendant.

3. Each of defendants' statements shall list and describe with particularity (a) each legal argument upon which defendants intend to rely at trial, together with appropriate statutory references, case law, and other citations, (b) each factual contention defendants intend to advance at trial, whether made affirmatively or in response to plaintiff's contentions, (c) under each factual heading, a list of witnesses and the documentary or other evidence which defendants will use to support that contention, (d) whether such evidence is presently in defendants' possession, and if not, where in their view it may be found, and (e) why, in defendants' view, all or part of the relief sought by plaintiff would be inappropriate assuming the relevant violation is proven.

4. Except as leave may otherwise be granted by the Magistrate, no Statement of Contentions and Proof may enlarge upon the contentions set forth in the preceding statement, as amended by any applicable pretrial order, whether by broadening an existing contention or by adding a new contention. If leave to enlarge the contentions is sought based upon evidence discovered since the filing of the preceding statement, it will be freely granted with respect to the second statement, granted only for good cause shown with respect to the third statement, and granted only to prevent manifest injustice with respect to the fourth statement. Consistent with the authority vested in him by Pretrial Order No. 13, the Magistrate shall have the authority to determine whether a particular statement would narrow or enlarge upon contentions made in previous statements,

whether an enlargement is based upon evidence discovered since the filing of the preceding statement, and whether the applicable standard for the granting of leave has been met.

5. Each party's discovery shall be limited to documents and other evidence which will support the contentions specified in its most recent Statement of Contentions and Proof or which will directly rebut contentions made in the most recent statement of the opposing party; except that after the filing of its first statement but prior to the filing of its second statement a party may, with leave of the Magistrate, engage also in discovery regarding matters which are generally material to issues raised by the complaint and answer.

6. Each party's evidence at trial shall be limited to those items of proof listed in its final Statement of Contentions and Proof, as modified by the pretrial conference of May 1, 1980.

7. Special pretrial conferences shall be held on or about June 1, 1979, December 1, 1979, and May 1, 1980, in accordance with Rule 16, F.R.Civ.P. The agenda for each conference shall include, but shall not be limited to, the definition, simplification, and narrowing contentions and issues; the restriction of unnecessary discovery; the stipulation of fact; and the resolution of any disputes arising from the parties' Statements of Contentions and Proof. A pretrial order shall be issued at the conclusion of each pretrial conference.

8. On April 1, 1980, all discovery shall be closed.

9. By agreement of the parties, any subpoenas for the taking of testimony or the production of documents under Rule 45, F.R.Civ.P., shall be issued through the Clerk of this Court.

10. Magistrate's Discovery Order No. 2, including its restrictions on the taking of substantive depositions, is hereby vacated.

/s/ HAROLD H. GREENE
Harold H. Greene
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1698

UNITED STATES OF AMERICA, *Plaintiff*,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY; WESTERN ELECTRIC CO., INC.; BELL TELEPHONE LABORATORIES, INC., *Defendants.*

Pretrial Order No. 13

(Filed September 11, 1978)

Upon consideration of the contentions raised with respect to the authority of Magistrate Lawrence S. Margolis under the order of February 7, 1978, and it appearing that the authority of the Magistrate should be clarified, it is this 11th day of September, 1978, in accordance with this Court's opinion of today,

ORDERED That, except as may hereafter be directed by the Court, Magistrate Lawrence S. Margolis shall supervise all pretrial discovery and adjudicate all discovery disputes, other than those which have been or may hereafter be delegated to the Special Masters, and he shall perform such additional duties with respect to discovery or other matters as the Court may direct pursuant to 28 U.S.C. § 636(b) and Local Rules 3-8 and 3-9, and it is further

ORDERED That the order entered on February 7, 1978, is hereby vacated effective this date.

/s/ HAROLD H. GREENE
Harold H. Greene
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1698

UNITED STATES OF AMERICA, *Plaintiff*,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY; WESTERN ELECTRIC CO., INC.; BELL TELEPHONE LABORATORIES, INC., *Defendants.*

Memorandum on Motion for Reconsideration

(Filed October 18, 1978)

Defendants have moved for reconsideration of portions of the Court's rulings of September 11, 1978. As defendants readily concede, notwithstanding its length, the memorandum in support of the motion goes "over much the same ground" as previous submissions (memorandum, p. 201). Except for elaborations of points previously made and the citation of additional case authority, it advances few contentions not previously considered by this Court. For that reason, while the Court has carefully reviewed every aspect of the motion, the government's reply, defendants' response, and all the accompanying papers, only a limited number of points bear further discussion.[1]

Defendants again contend that the Federal Communications Commission has exclusive jurisdiction over defend-

[1] Although the Court has granted defendants' motion to file a 202-page memorandum, well in excess of the limit provided for under the Rules, it does not intend to address every aspect of that document in writing. Contrary to the assumption repeatedly made by defendants (*e.g.*, memorandum, pp. 27, 33, 164, 167), failure specifically to discuss a point does not warrant the inference that the matter was not considered.

ants and all or many of their activities, and that the Court therefore lacks jurisdiction over this antitrust suit. Not only was this contention rejected in the September 11 opinion following full briefing and argument, but it had likewise been exhaustively briefed, argued, considered, and found to lack merit by Judge Waddy in 1976. *United States* v. *Am. Tel. & Tel.*, 427 F. Supp. 57 (D.D.C.), *cert. denied*, 429 U.S. 1071 (1977), *cert. denied*, No. 77-1009 (D.C. Cir. May 27, 1977), *cert. denied*, 434 U.S. 977 (1977). This issue has thus been considered independently three different times by three different tribunals,[2] and no purpose would be served by plowing over the same ground yet once more.

It might be worth noting on the jurisdictional question only that it is not correct—as defendants keep emphasizing—that unless the Court finds *exclusive* jurisdiction in the Federal Communications Commission, there will be no mechanism for reconciling such conflicts between regulatory and antitrust standards imposed on defendants as might be found to exist with respect to particular conduct. The Court has previously stated that, if and when conflicts of this nature should become apparent after the issues have been crystallized, matters relating to them will be referred to the Commission under the doctrine of *primary* jurisdiction (slip opinion, p. 21). But for the reasons fully stated in the September 11 opinion, there is no basis for dismissing this antitrust action on FCC-exclusive-jurisdiction grounds. Indeed, in a thoughtful and exhaustive opinion issued within the past two weeks, Judge John F. Grady reached precisely the same conclusion, rejecting arguments very similar to those advanced here. *MCI Communications*

[2] I.e., by Judge Waddy in 1976; by the U.S. Court of Appeals in 1977; and by this Court in 1978 (in addition to the denial of two certiorari petitions by the U.S. Supreme Court).

Corp. v. *Am. Tel. & Tel.*, No. 74 C 633 (N.D. Ill., Oct. 6, 1978).[3]

Defendants next contend that the Court should have included the Federal Communications Commission, other independent regulatory bodies, and the United States Postal Service in the concept of the "United States" as plaintiff in this action for purposes of Rule 34 discovery. Inasmuch as defendants expressly disavow seeking reconsideration of the Court's pretrial order in this respect, there is nothing upon which the Court might rule.[4] Nevertheless, in view of the circumstances related in note 4, *supra*, and in order to afford defendants the benefit of

[3] Judge Grady concluded, *inter alia*, that there is no basis for concluding that AT&T is immune from the antitrust laws merely because it is a regulated common carrier (slip opinion, pp. 9-12); that a finding of immunity with respect to discrete conduct will not result in a dismissal where such conduct is alleged to be part of a pattern of monopolization (slip opinion, pp. 15-24); that the FCC has never authorized, approved, or sanctioned AT&T's allegedly improper conduct with respect to interconnection and that it has not supervised the interconnection practices so closely that its approval of such conduct could be inferred (slip opinion, pp. 25-36); and that AT&T's "sham" tariff filings were likewise not immunized from the antitrust laws by virtue of FCC regulation (slip opinion, pp. 36-41).

[4] The Court denies defendants' unusual request that it take this aspect of defendants' motion under advisement "subject to defendants' right to call up their motion," presumably at any time of their choosing. Motions and other pleadings filed by the parties will be disposed of by the Court in accordance with established procedures (Rule 6, F.R.Civ.P., Local Rule 1-9) particularly where, as here, the process being proposed would merely cause prolonged uncertainty and confusion. In the Court's judgment, its ruling was correct, and there is thus nothing to take under advisement. Identical considerations apply to defendants' demand that the Court take under advisement pending future defense decision the jurisdictional rulings and the bulk of defendants' objections to the pretrial and discovery procedures embodied in Pretrial Order No. 12.

every consideration of their claims, the Court has reviewed the arguments made, but has found nothing that would in any way impair the September 11 rulings contained in Part II of the opinion.

One new contention not previously considered is that the Department of Justice might secure from the Federal Communications Commission whatever documents defendants might seek for discovery purposes by causing the President to remove from office any member of that Commission who fails to vote to release such records for this purpose (memorandum, p. 144). However, as *Wiener* v. *United States*, 357 U.S. 349 (1958), makes clear, with respect to members of independent regulatory commissions "a power of removal exists only if Congress may fairly be said to have conferred it." In the absence of other legislative direction this means that removal can be effected only "for cause involving the rectitude of a member" (357 U.S. at 356). It goes without saying that failure to cooperate in Rule 34 discovery in a civil action brought by the Department of Justice on behalf of the Executive Branch is not "cause involving rectitude."[8]

It is next argued once again that defendants should not be required to produce documents which were previously turned over to two private antitrust plaintiffs in actions in other districts (*Litton Systems, Inc.* v. *Am. Tel. & Tel. Co.*, No. 76 Civ. 2512 (S.D.N.Y. 1976); *MCI Communications Corp.* v. *Am. Tel. & Tel. Co.*, Civil No. 74 C 633 (N.D. Ill. 1974)) irrespective of the nexus of the documents to this case. In addition to contentions previously made, defendants state that the Court failed to address, or to address adequately, their reliance upon protective orders in those

[8] Defendants are not without a remedy, however, with respect to possible refusals of regulatory commissions to cooperate in discovery. As the Court has previously stated, it will assist defendants in this area "to the full extent of its authority with respect to any legitimate requests" under Rule 45, F.R.Civ.P. (slip opinion, p. 34).

cases and upon alleged representations by government counsel in *MCI* that those documents would not be sought by the government. That aspect of the matter is dealt with by Judge Grady, the judge in control of the *MCI* litigation, who explained at pp. 3-6 of his October 9, 1978, memorandum decision:

> . . . [W]e do not believe that defendants were justified in regarding either the pretrial order or the discussion with the Department of Justice attorneys as constituting a guaranty that material produced to MCI would be protected from discovery by other parties. As far as the protective order is concerned, it is in terms subject to change by further order of court. (Par. 5). It does not purport to furnish a lifetime guaranty; and even if it did, it would be difficult for a sophisticated litigant to take such a grandiose assurance literally. Where the ends of justice require disclosure, as we believe they do here, it would be irresponsible for a court to enforce perpetual secrecy where the sole ground for doing so is simply that one party wants it. There is no indication that Judge Lynch did or said anything which defendants could reasonably have interpreted as the absolute guaranty they now seek to enforce.
>
> [As concerns the] alleged promise by Mr. Verveer, the Department of Justice attorney, that the Government would not seek to obtain documents produced for MCI in this litigation, . . . [i]t does not make sense to us that so significant an undertaking would have occurred so casually and under the circumstances alleged. There was no reason for Mr. Verveer to make such a commitment. There was no negotiation for it and nothing was conceded in return for it . . . Had there really been an understanding of the kind alleged, there was every reason to reduce it to writing. . . .

> Under all of the circumstances, this court simply does not believe that Mr. Verveer made the commitment attributed to him by defendants. Furthermore, the defendants own conduct at the time is inconsistent with the hypothesis that they thought he had made it.

Moreover, defendants' arguments concerning the protective orders prove too much. They contend in this Court that because the *MCI* and *Litton* documents are under protective orders, they are beyond the reach of discovery here. At the same time, they are arguing in the U.S. Court of Appeals for the Seventh Circuit (Appendix B to defendants' response to the government's reply to motion for reconsideration) that the *MCI* court is without authority to lift a protective order once entered. If these contentions are correct, defendants would be immunized, as a practical matter, from ever having to provide adequate discovery in this action. A great many private lawsuits are pending against AT&T throughout the country, a number of them involving protective orders. It could hardly be that meaningful discovery from defendants in this case must await the day when all of those actions are finally concluded, ending only at that time the claimed document immunity provided by the protective orders.[6] Records may of course be relevant to one, two, or ten different lawsuits, and there is no basis for concluding that the court in which they happen to have been produced first has the power, by virtue of that fact, to preclude their production when a litigant in another

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[6] On defendants' theory, the immunity may not end even then. This week they objected in this Court to a request for the production of documents apparently used as evidence during a trial, on the ground that production would violate a protective order of the U.S. District Court for the District of South Dakota. *TV Signal Company of Aberdeen* v. *Am. Tel. & Tel. Co.*, Civ. Action No. 70-6N (D.S.D.).

action[7] legitimately requires them for the preparation of his case.[8]

Defendants also argue that this Court assumed that relevancy of the *MCI* and *Litton* documents for purposes of this case would be "assured by their having been thoroughly screened for relevancy in the private actions" (memorandum, pp. 173-4). The quoted statement and the text surrounding it simply omit entirely any reference to the relatively lengthy discussion in the Court's opinion (pp. 40-42) which concluded that relevancy was guaranteed primarily by the circumstance that the subject matter in the instant case virtually embraces the subject matter in *MCI* and *Litton*, and that what was relevant there is therefore almost *a fortiori* relevant here.[9]

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[7] Different considerations may be applicable when, as in *GAF Corporation* v. *Eastman Kodak Company*, 415 F. Supp. 129 (S.D. N.Y. 1976), the records are demanded not in an existing litigation context or are sought for some other purpose. It is in such circumstances, or to protect confidentiality, that protective orders serve their real purpose.

[8] This Court in its September 11 ruling indicated that for reasons of comity leave should be sought from the courts which had entered protective orders—and of course the *MCI* court has already granted its permission. However, conceptually such leave is not a prerequisite to an order to defendants to produce copies of their own records in this lawsuit in which they are parties. A contrary rule might well lead to unseemly scrambles between litigants and clashes between courts for records which are equally needed in several places. The sensible solution to this dilemma is that adopted by Judge Grady who interpreted the protective order in the Northern District of Illinois as not depriving the litigants here of their needed discovery since "the ends of justice require disclosure" for purposes of the instant action.

[9] This lack of mention of the principal basis of the Court's holding on this issue is compounded by the fact that the reference to the Court's opinion is so couched as to be misleading. The opinion of September 11 does not state that relevancy is assured by the screening process, but that relevancy of the documents

Defendants contend that under the pretrial and discovery plan set forth in the September 11 orders they, and the government, will be restricted to the discovery of evidence admissible at trial, and that they will be precluded from discovery relevant to the "subject matter" of the action. That contention misconceives the Court's ruling. Under the pretrial order, the parties may at all times during the pretrial stages specified in the order engage in "discovery regarding any matter . . . which is relevant to the subject matter involved in the pending action," that is, which relates to the claims or defenses of the parties. Rule 26(b)(1), F.R.Civ.P. As explained in the Rule, this includes not only items which would be admissible at trial, but also "items reasonably calculated to lead to the discovery of admissible evidence." What Pretrial Order No. 12 provides is that prior to the filing of the Statements of Contentions and Proof, the "subject matter" of this action is determined by the claims and defenses raised in the Complaint and Answer, while thereafter it is defined by the pretrial orders entered following the filing of each set of Statements.[10] Under Rule 16, F.R.Civ.P., the pretrial orders will successively narrow the subject matter in accordance with the material issues (as defined in the Statements and at the special pretrial conferences). Thus, as the issues in the somewhat amorphous Complaint and Answer achieve

"is *further* assured by their having been thoroughly screened for relevancy in the private actions" (emphasis added) (slip opinion, p. 42).

[10] Inasmuch as issues will in all likelihood not have been delineated with any degree of precision after the filing of the first set of Statements and prior to the filing of the second, a special pretrial conference would probably not serve a useful purpose at that juncture, although it is not excluded should it appear to be helpful for discovery or other purposes. Further, the subject matter of the action will have been narrowed in any event during that period by the Statements filed in conformity with Pretrial Order No. 12.

greater precision, the scope of discovery under Rule 26(b)(1) will appropriately narrow in conjunction with them.[11]

Finally, it is argued that the pretrial and discovery plan embodied in the pretrial orders was adopted without consultation with the parties. Even if this claim were correct, it would not impair the validity of the procedures, for the Court is responsible for setting the timing of the pretrial phases of the litigation, and its decision obviously is not inappropriate or invalid merely because specific provisions were not proposed by the parties. In any event, not only did the Court have before it the government's proposals, Magistrate's Discovery Order No. 2, and defendants' appeal from that order (all of which deal with the subject of pretrial and discovery scheduling), but it specifically set down for the August 21, 1978, status hearing the issue of "whether present orders . . . establishing responsibilities and schedules for further proceedings, including further discovery and orders of proof are adequate, and if not, how they should be modified." The Court does not deem that it is precluded from proceeding to carry out its responsibilities because defendants did not propose a specific procedure for proceeding with the pretrial phases of this litigation.

[11] Defendants' objection to this procedure, if accepted by the Court, would preclude for the indefinite future both a narrowing of the issues and a limitation on discovery—devices well sanctioned by the Rules, and regarded by both courts and textwriters as indispensable to the achievement of substantive dispositions within a reasonable time, especially in cases of this kind. See, *e.g.*, *Life Music, Inc.* v. *Broadcast Music, Inc.*, 31 F.R.D. 3 (S.D.N.Y. 1962); *United States* v. *Standard Oil Company (New Jersey)*, 23 F.R.D. 1, 4 (S.D.N.Y. 1958); R. McLaren, *Procedure in Private Antitrust Cases*, 21 F.R.D. 440, 446-47 (1957); J. Withrow and R. Larm, *The "Big" Antitrust Case: 25 Years of Sisyphean Labor*, 62 Cornell L. Rev. 1, 26-30 (1976); and the authorities cited in note 94 of the September 11 opinion. See also Rules 15, 16, and 21, F.R.Civ.P.

For the reasons stated herein and in the Opinion of September 11, 1978, it is this 18th day of October, 1978,

ORDERED That the motion for reconsideration be and it is hereby denied.

/s/ HAROLD H. GREENE
Harold H. Greene
United States District Judge

October 18, 1978

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 74 C 633

MCI COMMUNICATIONS CORPORATION, et al., *Plaintiffs,*

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, et al.,
Defendants.

Memorandum Decision

The motion of the United States to permit access to pretrial discovery and cooperation of counsel is allowed.

The voluminous materials filed in connection with this motion since we first considered it in December of 1977 have done nothing to change our perception of the basic issues presented nor our initial impression as to how they should be resolved. Basically, we were concerned with two questions: First, whether allowing the Government's motion would interfere with the control this court or the District of Columbia court has over the case and the litigants before it; second, whether granting the Government's motion would unfairly prejudice the defendants.

On the first question, there is nothing about allowing MCI to turn over materials to the Government that would in any way hamper or compromise our control over this case. And, as we will indicate shortly, we do not believe such court approved cooperation by MCI would violate the intent of the protective order signed by Judge Lynch. Certainly, it will not violate what we consider to be the proper scope of such a protective order.

The defendants' principal argument was that our granting the Government's motion would interfere with Judge

Waddy's control over the timing and sequence of discovery in the District of Columbia case. Any doubt about the desires of the judge handling the District of Columbia case has been forcefully dispelled by the opinion of Judge Harold H. Greene, filed September 11, 1978. Judge Greene, who took over the case upon Judge Waddy's death, has clearly stated that the efficient conduct of the case requires that AT&T turn over to the Government all of the documents it produced for MCI in this case. He denied without prejudice the defendants' motion to compel production of the deposition transcripts and associated exhibits in this case because he had not been informed by the Government as to whether considerations other than those which pertain to the microfilmed documents might be involved. (Opinion, p. 46, n.91). We know of no such additional considerations, and therefore, insofar as the lifting of this court's protective order is concerned, MCI will be authorized to make available to the Government the deposition transcripts and attached exhibits as well as the microfilmed exhibits.

We agree wholly with Judge Greene's comments about the desirability of avoiding unnecessary duplication of discovery in these two cases. Absent any element of unfairness which might be presented by the facts peculiar to a particular case, we believe the court should not only encourage the sharing of discovery in cases with common fact questions but order it on its own motion even where the parties do not suggest it. Certainly, such a philosophy is consistent with if not essential to the concept of multi-district litigation.

Turning now to the issue of unfair prejudice, this breaks down into an analysis of two things upon which the defendants claim they have relied, to their detriment. First, defendants say they relied upon the pretrial order of August 6, 1974. Second, they claim to have relied upon a categorical assurance by a Department of Justice Attorney, made on December 19, 1974, to the effect that the Government would never seek to obtain from MCI any of the documents produced by AT&T in this litigation. Defendants say that in reliance upon each of these things, they produced documents for MCI which the Government would not be entitled to obtain itself by way of discovery in the District of Columbia case.

We believe this reliance argument fails for two reasons. First, the defendants simply have not shown that anything discovered by MCI in this case would be protected from discovery in the District of Columbia case. There is no claim that any privilege objection was waived; indeed, a special master in this case has spent a great deal of time ruling on the many claims of privilege that were asserted. There is no reason to believe that the rulings would be any different in the District of Columbia. Defendants point to various matters in certain depositions which they say are "embarrassing," but this is a claim we find to be exaggerated and, in any event, without legal significance.

More than this, however, we do not believe that defendants were justified in regarding either the pretrial order or the discussion with the Department of Justice attorneys as constituting a guaranty that material produced to MCI would be protected from discovery by other parties. As far as the protective order is concerned, it is in terms subject to change by further order of court. (Par. 5). It does not purport to furnish a lifetime guaranty, and even if it did, it would be difficult for a sophisticated litigant to take such a grandiose assurance literally. Where the ends of justice require disclosure, as we believe they do here, it would be irresponsible for a court to enforce perpetual secrecy where the sole ground for doing so is simply that one party wants it. There is no indication that Judge Lynch did or said anything which defendants could reasonably have interpreted as the absolute guaranty they now seek to enforce.

The alleged promise by Mr. Verveer, the Department of Justice attorney, that the Government would not seek to

obtain documents produced for MCI in this litigation stands on a somewhat different footing than the protective order. This promise, if made, was a commitment by the Government (putting to one side the question of Mr. Verveer's authority) and, more than that, was a promise made by one lawyer to another. It may be that ethical considerations would require enforcement of such a promise even in the absence of any change of position by the promisee. Therefore, if it were reasonable to believe that the parties understood that Mr. Verveer was making a binding commitment not to seek the results of the discovery in this case at any time, we might well be inclined to enforce that commitment regardless of other considerations. We turn, therefore, to the question of whether the parties did in fact reach such an understanding.

We are satisfied with the Government's explanation of the matter. It does not make sense to us that so significant an undertaking would have occurred so casually and under the circumstances alleged. There was no reason for Mr. Verveer to make such a commitment. There was no negotiation for it and nothing was conceded in return for it. The supposed "categorical" statement is mentioned only incidentally in Mr. Levy's memorandum prepared after the meeting and the Government attorneys present at the meeting made no written note of it at all. This lack of documentation does not seem to us to signal a meeting of minds on what counsel for the defendants calls ". . . an issue of earthshaking importance to my client." (Transcript of Proceedings of December 7, 1977, p. 9). We have reason to be well aware that counsel in this case do not shrink from paperwork. Had there really been an understanding of the kind alleged, there was every reason to reduce it to writing. Aside from the obvious desirability of having documentary evidence that a promise was made at all, it would have been clear to everyone that the exact extent of the commitment should be specified. (The problem in not doing so is illustrated by the fact that while defendants urge the promise

as a bar to *any* discovery materials in this case, including depositions, Mr. Levy's contemporaneous memorandum refers only to a statement about "documents.") All counsel anticipated on December 19, 1974, that parallel discovery in the two cases would be ongoing for years and that therefore any agreement reached on that date might be invoked years later by one side or the other. Under these circumstances, competent and responsible counsel who really believed that they had reached agreement on an important issue affecting two cases of this magnitude would not have chosen to rely on memory but would have committed that agreement to writing.

Under all of the circumstances, this court simply does not believe that Mr. Verveer made the commitment attributed to him by defendants. Furthermore, the defendants own conduct at the time is inconsistent with the hypothesis that they thought he had made it.

MCI may forthwith make available to the United States Department of Justice all discovery materials obtained in this case, including documents, deposition transcripts and exhibits referred to in depositions. Counsel for MCI may also cooperate with the Department of Justice by furnishing any explanatory material or information which would be helpful to an understanding of the items produced. The intent of this order is to make available to the Government relevant information for use in its case against AT&T now pending in the District Court for the District of Columbia, and, until further order of this court, the information and material furnished to the Government by MCI pursuant to this order shall not be used for any other purpose. If a more specific protective order is thought necessary by any party, we will entertain an appropriate motion.

DATED: October 9, 1978

ENTER:

/s/ JOHN F. GRADY

United States District Judge

APPENDIX E

Federal Rules of Civil Procedure

Rule 26

General Provisions Governing Discovery

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Insurance Agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for

payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was

complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

Rule 34

Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and

which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 74 C 633

MCI COMMUNICATIONS CORPORATION, ET AL.,
Plaintiffs,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.,
Defendants

and

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.,
Counterclaimants

v.

MCI COMMUNICATIONS CORPORATION, ET AL.,
Counterdefendants

Protective Order

WHEREAS, this case involves numerous and complex issues as to which parties have served broad and comprehensive requests for the production of documents pursuant to Rule 34 of the Federal Rules of Civil Procedure;

WHEREAS, each of the parties maintains voluminous records, including millions of printed or typewritten documents as well as computerized information subject to production pursuant to the document requests served by the parties;

WHEREAS, many of the documents and other discovery materials of each of the parties are likely to be confidential in nature within the meaning of Rule 26 of the Federal Rules of Civil Procedure, many documents and other discovery materials of each of the parties are likely to be privileged under Rule 26 of the Federal Rules of Civil

Procedure, and many documents and other discovery materials are likely to be protected from production as work product within the meaning of Rule 26 of the Federal Rules of Civil Procedure;

WHEREAS, the public interest in the prompt and orderly administration of justice requires that production of the voluminous documents and other discovery materials involved in the discovery requested in this case proceed as expeditiously as possible;

WHEREAS, none of the parties is willing to waive any of its rights with respect to any of its documents which are confidential or privileged or which reflect work product under Rule 26 of the Federal Rules of Civil Procedure;

WHEREAS, the need for prompt and orderly discovery is not inconsistent with the ability of the parties to make some examination to determine whether documents and other discovery materials are confidential or privileged or reflect work product but may make it impossible for them to conduct such examination on a sufficiently thorough basis to insure that their rights under Rule 26 of the Federal Rules of Civil Procedure are fully protected with respect to such documents and other discovery materials and;

WHEREAS, the Court wishes to establish procedures which are fair to all the parties, which will expedite the discovery process, and which will facilitate the handling by this Court of any problems that may arise in connection with discovery;

IT IS THEREFORE ORDERED that:

1. This order shall govern all documents and other discovery materials produced in response to any document request made upon plaintiffs or defendants in the above-captioned matter and to any deposition or portion of a deposition as to which confidential status is requested by either party.

2. All documents and other discovery materials as to which a claim of privilege or work product is asserted by any party shall be segregated by that party and shall be retained until further order of Court.

3. The production of any document or other discovery material by plaintiffs or defendants under this Order shall be without prejudice to any claim that such material is privileged under Rule 26 of the Federal Rules of Civil Procedure or protected from discovery as work product within the meaning of Rule 26 of the Federal Rules of Civil Procedure, and no party shall be held to have waived any rights under Rule 26 by such production. Any document or other discovery material turned over to an opposing party with respect to which a claim of privilege or work product is subsequently made shall be returned to the party producing the same, provided that the party disputing the claim of privilege may point the issue to the Court for determination. That determination will be made without regard to the fact that such document has been turned over to the other party pursuant to this Order. If the Court upholds the claim of privilege or work product, all copies of the document or other discovery material will be returned to the party producing it, or expunged, and, in either event, such document or other discovery material cannot be introduced into evidence in this or any other proceeding by any person without the consent of the party producing it; nor will such document be subject to production in any proceeding by virtue of the fact that it had been inadvertently disclosed in this proceeding.

4. All documents and other discovery material produced by plaintiffs and defendants shall initially be treated as confidential material, and if such status is requested by either party, all depositions or portions of depositions shall initially be treated as confidential.

5. With respect to any documents or other discovery material or any deposition which has been designated as

confidential, any other party may file a motion with the Court that such material should not be deemed confidential. Unless and until otherwise ordered by this Court, however, all documents and other discovery material and any deposition designated as confidential hereunder may be inspected only by the persons herein described.

6. Confidential material and any copies thereof, and notes made therefrom shall be disclosed only to attorneys in the offices of Jenner & Block and Sidley & Austin or to persons regularly employed in such attorneys' offices or to persons provided for in paragraph 7 hereof for use solely in the preparation or trial of this action. No copies shall be made except by or on behalf of attorneys from said offices. Any such attorneys making or causing to be made copies of confidential material shall maintain those copies within the possession of themselves or those entitled to access to such documents under paragraph 7 of this order.

7. Confidential material may be disclosed to other persons (other than attorneys in the offices of Jenner & Block and Sidley & Austin and persons regularly employed in their offices) whose assistance is required by said attorneys in the preparation or trial of this action, upon compliance with the following requirements of this paragraph. Each party will provide the other with a list of the persons who are to be regularly employed in this capacity before any documents are produced. Subject to this provision, this list may be supplemented from time to time as necessary so long as the names of such persons are submitted to the other party in sufficient time prior to their gaining access to confidential documents to permit objection to any person whose name is submitted. Each party reserves the right to object to any person being included on the list of those entitled to regular access to confidential documents. As to persons designated as entitled to regular access to confidential documents, as well as any other person to whom confidential material may be disclosed from time to time,

each such person shall first be advised by the attorney making the disclosure that pursuant to this protective order such person may not divulge such confidential material to any other persons except in the preparation or trial of this action and that disclosure in the preparation of the case is limited to persons entitled to knowledge of such documents under this Order. The attorney shall secure from each such person an affidavit describing the affiant and stating that he has read this protective order and understands that, pursuant to this protective order, he may not, and that he undertakes not to, divulge any confidential material except in accordance with this Order. Where such affidavit is executed by a person not regularly employed by a named party to this action, that affidavit, together with a list of the confidential material disclosed to such person, and the date of disclosure, shall be retained by the attorney making the disclosure. Where such affidavit is executed by a person regularly employed by a named party, but not designated in the list of the persons regularly employed in assisting in the litigation, that affidavit shall be served on counsel for the party producing the confidential document within 5 days after its execution, and the attorney making the disclosure shall retain a list of the confidential material disclosed, and the date of disclosure.

8. Confidential material may be disclosed to deponents during the course of their depositions if the attorney making such disclosure first advises the deponent that pursuant to this protective order such person may not divulge such confidential material to any other person.

9. In the event that any confidential material is included with, or the contents thereof are in any way disclosed in any pleading, motion, deposition transcript or other paper filed with the Clerk of this Court, such confidential material shall be kept under seal by the Clerk until further order of this Court; provided, however, that such paper shall be furnished to the Court and attorneys for the named parties,

and a duplicate copy thereof, with the confidential material deleted therefrom, may be placed in the public record.

10. Nothing in the foregoing provisions of this protective order shall be deemed to preclude any party from seeking and obtaining, on an appropriate showing, additional protection with respect to the confidentiality of documents or other discovery material.

IT IS SO ORDERED:

/s/ WILLIAM J. LYNCH

Judge, United States District Court

August 6th, 1974

Agreed to as to form and substance:

/s/ GEORGE L. SAUNDERS, JR.
George L. Saunders, Jr.

Attorney for all defendants

/s/ ROBERT L. BOMBAUGH
Robert L. Bombaugh

Attorney for all plaintiffs

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 76 Civ. 2512 (WCC)

LITTON SYSTEMS, INC., ET AL.,
Plaintiffs,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,
Defendants.

NEW YORK TELEPHONE CO., INC., ET AL.,
Counterclaimants,

v.

LITTON SYSTEMS, INC., ET AL.,
Counterdefendants.

Protective Order Governing Pretrial Discovery

WHEREAS, the parties are engaged in a discovery program which involves the production of documents, answering interrogatories, and the taking of testimony by oral deposition; and

WHEREAS, the parties and nonparties may be requested to produce trade secret or other confidential research, development or commercial information; and

WHEREAS, the public interest in the prompt and orderly administration of justice requires that the discovery of information proceed as expeditiously as possible; and

WHEREAS, Rule 26(c) of the Federal Rules of Civil Procedure provides for the issuance of protective orders limiting the disclosure of discovered information in appropriate circumstances;

IT IS HEREBY ORDERED THAT:

1. This Order shall control the confidentiality of information contained in documents, interrogatory answers, deposition testimony or otherwise produced in this action by parties and nonparties during the pretrial phase of this proceeding.

2. For purposes of this Order, "confidential information" means information contained in any document, deposition testimony, interrogatory answer or otherwise produced in this action and designated in good faith as confidential by the producing party or nonparty, except for documents or information already disclosed by the producing party or nonparty. In making decisions as to what documents may properly be designated confidential, documents previously designated as confidential or proprietary or submitted to any person in a regulatory or administrative proceeding, or to any other governmental agency on a confidential basis within the five years preceding the date of this Order may be designated as confidential in this action. However, the designation of such information as confidential under this Order does not create any presumption for or against the confidentiality of such information where the issue is presented to the Court through the Magistrate under Paragraph 8 of this Order.

3. Information contained in documents, interrogatory answers, or otherwise produced in written form for which a claim of confidentiality is made shall be designated confidential by stamping "(name of the producing party or nonparty)—Confidential" on the face of the writing. In the case of documents, the stamping of such documents as "confidential" may take place either prior to the production of the documents by the party or nonparty, or subsequent to the selection of the documents by the receiving party for copying but prior to the actual copying of the documents if done expeditiously.

4. In the event that any question is asked at a deposition which a party or nonparty asserts calls for confidential information, such question shall nonetheless be answered by the witness fully and completely. Counsel for the disclosing party or nonparty shall, either at the deposition or within 30 days after receipt of the transcript thereof by said counsel, notify all other counsel, on the record or in writing, that the information provided in such answer is confidential. Those portions of a deposition that are designated in good faith as confidential shall be filed separately and under seal with the Court. Deposition transcripts will be treated as confidential until 30 days after receipt thereof by counsel for the disclosing party or nonparty unless otherwise agreed to by the producing party or nonparty.

5. All documents and other discovery materials as to which a claim of attorney-client privilege or attorney work product is asserted by any party or nonparty shall be segregated by that party or nonparty and shall be retained until further order of the Court through the Magistrate.

6. The information produced in this action and designated in good faith as confidential by the producing party or nonparty in accordance with Paragraphs 3 and 4 above shall be treated by counsel for the parties as confidential and may be reviewed and copied by other counsel of record, but shall not be used or disclosed to any other person except as set forth herein, or unless agreed to in writing by counsel for the producing party or nonparty, or as permitted by order of the Court through the Magistrate. Such confidential information and documents designated in good faith may be disclosed by counsel hereto only as follows and after complying with the procedure set forth herein:

(a) To attorneys of record, their associated attorneys, and their non-technical clerical staff employed in the preparation for, and the trial of, this action; and

(b) To other persons requested by counsel to furnish technical or other expert services or to give testimony,

or otherwise to prepare for the trial of this action, who shall, before any disclosure is made, sign a Written Assurance in the following form. A copy of said form shall be furnished to opposing counsel of record at least ten days before any disclosure is made to such person so designated. If an objection is made, no such person shall be given access to any confidential material until resolution of the objection by the parties or the Court.

WRITTEN ASSURANCE

I, _____ (insert name, business position and address), being duly sworn, state that I reside at _____, in the City of _____ _____, County of _____, State of _____, and that I have read and fully understand the Order dated _____, and am engaged as a _____ (insert description of position) on behalf of _____ in the preparation and conduct of the action entitled *"Litton Systems, Inc., et al.* v. *American Telephone and Telegraph Company, et al.*, Civil Action No. 76 Civ. 2512 (WCC)"; and that I am fully familiar with and agree to comply with and be bound by the provisions of said Order; and that I will not divulge to persons other than those specifically authorized by said Order, and will not copy or use except solely for the purpose of this action, any information obtained pursuant to said Order except as expressly permitted by the Court.

Dated at _____, _____
this ____ day of _____, 19__.
[Acknowledgement]

7. All information subject to confidential treatment in accordance with the terms of this Order which is filed with the Court or the Magistrate, and any pleading, motion or other paper filed with the Court or Magistrate disclosing

any such confidential information, shall be filed under seal and kept under seal until further order of the Court or Magistrate; however, said information shall be available to the Court and the Magistrate and counsel of record. Where possible, only the confidential portions of filings with the Court or Magistrate shall be filed under seal.

8. If at any time a party disagrees with a designation of information as confidential by a party or nonparty under this Order, the disagreeing party shall notify the designating party or nonparty in writing that it no longer intends to treat that information as confidential. Within twenty days of the receipt of such notice, the designating party or nonparty may apply to the Court through the Magistrate for a ruling as to the confidentiality of the information. Said application shall set forth in detail the reasons why the information is entitled to confidential treatment. If no application is submitted within the twenty (20) day period, or if the Court through the Magistrate determines the information is not entitled to confidential treatment, the documents or other information shall no longer be entitled to confidential status. The confidentiality of the information shall be maintained until the Court through the Magistrate rules on the application.

9. Upon final termination of this action, the parties and nonparties may request the return to them of all previously furnished confidential documents and any other information designated confidential, including any copies thereof, and each person or party to whom such confidential information and documents has been furnished or produced shall be obligated to return same, including any copies; provided, however, that any counsel of record may retain one copy of each item of information designated confidential solely for reference in the event of and only in the event of a dispute over the use or dissemination of information or documents subject to this Order.

10. This order is without prejudice to the rights of any party to apply for a subsequent Order permitting, on a

showing of good cause, the disclosure of confidential materials to governmental officials or counsel for parties in similar actions. The affected party or nonparty shall have ten (10) days within which to respond to said application after which the Court or Magistrate shall issue its ruling granting or denying the request and if granting it prescribing any conditions deemed necessary to protect the information to be disclosed.

11. The entry of this Order shall be without prejudice to the rights of any party or nonparty to apply for additional or different protection where it is deemed necessary.

12. This Order shall govern pretrial proceedings in this litigation unless modified by the Court or Magistrate or by the parties with the approval of the Court or Magistrate.

Approved this 20 day of December, 1976.

/s/ SOL SCHREIBER

United States Magistrate

SO ORDERED: 1/4/77

/s/ WM. C. CONNER

United States District Judge

Supreme Court, U. S.
FILED
NOV 7 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-761

AMERICAN TELEPHONE AND TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INC.; and
BELL TELEPHONE LABORATORIES, INC., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

MOTION TO ACCELERATE CONSIDERATION AND BRIEF IN SUPPORT OF MOTION TO ACCELERATE CONSIDERATION

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PALMER & WOOD
SIDLEY & AUSTIN

November 7, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INC.; and
BELL TELEPHONE LABORATORIES, INC., *Petitioners,*
v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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MOTION TO ACCELERATE CONSIDERATION

Now come petitioners and respectfully move the Court to accelerate consideration of their petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review an order and judgment of that court entered on review of an order of the district court in *United States* v. *American Tel. & Tel. Co.*, Civil No. 74-1698 (D.D.C.). Specifically, petitioners request the Court: (1) to set an early date for the Government to file its brief in opposition to the petition for writ of certiorari; and, in the event that certiorari is granted, (2) to set an early date for petitioners to file their brief on the merits and for the

Government to file its answering brief on the merits; and (3) to set this case for argument as soon as is convenient for the Court during this Term. In support of this motion, petitioners submit herewith their Brief In Support Of Motion To Accelerate Consideration.

Respectfully submitted,

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November 7, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INC.; and
BELL TELEPHONE LABORATORIES, INC., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN SUPPORT OF MOTION TO ACCELERATE CONSIDERATION

STATEMENT

The dispute from which the present petition for certiorari arises relates to a new strategy for conducting antitrust litigation and investigations adopted by the Antitrust Division of the United States Department of Justice. This new strategy marks a radical departure from the manner in which the Antitrust Division has conducted its litigation and investigations in the past and from the procedures for the conduct of litigation as set forth in the Federal Rules of Civil Procedure. The order of the district court below represents the first instance in which any court has given

approval to this new strategy, although no less than twelve courts have flatly rejected the new strategy in decisions as to which the Government has not sought appellate review (see petition, pp. 17-18).

The Antitrust Division's new strategy consists of appropriating for use in the conduct of its own litigation and investigations the fruits of the discovery conducted against a target company by private adversaries who have brought their own suits against the target company and have engaged in broad discovery and trial preparation in those cases. The Antitrust Division's frankly admitted purpose in engaging in this process of appropriation is to secure to itself the saving of time—and the consequent advantage over the target company in trial preparation and investigatory resources—which flows from relying on the work product of attorneys for private parties in the preparation of their own cases (see petition, pp. 8-11). The circumstances in which the present dispute arose furnish an ideal factual background for this Court to resolve the extremely serious and important question as to the propriety of the Antitrust Division's new strategy and to do so on an expedited basis.

The Government's efforts to appropriate the fruits of discovery conducted by private litigants in their disputes with a target against which the Government also wishes to proceed have produced a particularly unfair result in the proceeding below. The Government's civil antitrust action against the Bell System—*United States* v. *American Tel. & Tel. Co.*, Civil No. 74-1698 (D.D.C.)—was filed in 1974. While the Government and the Bell System were endeavoring to resolve their disputes as to discovery from one another,

the district court stayed all discovery in the action *on its own motion* on February 20, 1975, and ordered the parties to submit briefs on the question of the court's antitrust jurisdiction over the allegations of the complaint in view of the regulation of the Bell System's conduct, challenged in the complaint, by the Federal Communications Commission and state regulatory commissions. This stay was continued in effect for all but brief periods until November 28, 1977, while the jurisdictional issues were being briefed and argued, and, during that entire time, no discovery was taken in the action below by the Government against the Bell System or by the Bell System against the Government. (These events are described in greater detail on pages 3-7 of the petition.)

During the time that the jurisdictional issue was being briefed and argued and discovery was stayed in the Government's action below, two private antitrust actions brought against the Bell System—the *MCI* and *Litton* cases*—had proceeded expeditiously under protective orders which limited the use of some or all of the discovery taken in those actions to the preparation and trial of the respective actions in which the discovery was taken. Perceiving an opportunity to seize a massive advantage over petitioners in the preparation for trial of the action below, the Government sought to appropriate the discovery taken from the Bell System by MCI and Litton in their respective actions. The Government sought and obtained from the district court an order—Pretrial Order No. 11—requiring petitioners to turn over to the Government copies of the

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* *MCI Communications Corp., et al.* v. *American Tel. & Tel. Co., et al.*, No. 74 C 633 (N.D. Ill.); *Litton Systems, Inc., et al.* v. *American Tel. & Tel. Co., et al.*, No. 76 Civ. 2512 (S.D.N.Y.).

documents selected from their files in discovery by the attorneys for MCI and Litton. The Government also sought, but was denied for the present, an order of the district court directing petitioners to produce to the Government copies of the transcripts of the depositions of petitioners' officers and employees taken in the *MCI* and *Litton* cases.

The Government also pursued its strategy before the *MCI* district court, convincing that court to modify the protective order in that case to permit the Government to obtain from MCI the documents selected by MCI, the transcripts taken by MCI of petitioners' officers and employees, and analyses and indices of such discovery materials prepared by MCI's attorneys. However, the Government has continued to oppose and delay petitioners' efforts to obtain discovery from the Government, even though a related order entered by the district court—Pretrial Order No. 12—drastically restricts petitioners' ability to prepare for trial. (These circumstances are described in greater detail on pages 7-14 of the petition.)

Petitioners opposed the Government's efforts to secure the fruits of discovery in the *MCI* and *Litton* actions, and the issues were extensively briefed by the Government and petitioners before the district court below, the *MCI* district court, the United States Court of Appeals for the District of Columbia Circuit, the United States Court of Appeals for the Seventh Circuit, and before this court. A stay of the effectiveness of the district court's Pretrial Order No. 11 has been continued by Mr. Chief Justice Burger pending further order of the Chief Justice or of this Court, and a stay of the *MCI* district court's order permitting MCI's attorneys to furnish petitioners' documents to the Government and to cooperate with the Govern-

ment in preparing its case against the Bell System has been continued by the Seventh Circuit pending its ruling on the merits of petitioners' appeal from the *MCI* district court's order. (These proceedings are described on pages 15-17 of the petition.)

ARGUMENT

Expedited consideration by this Court of the petition for certiorari and of the merits of petitioners' challenge to the orders below is exceptionally important to the administration of justice in the federal courts and to the parties to this cause. Accelerated consideration would serve the interests of the orderly administration of justice in the federal courts for, in light of the serious issues as to the integrity of protective orders raised by the unprecedented orders of the district court below and of the *MCI* court, it is in the interest of sound judicial administration to resolve those issues as soon as possible, lest litigants begin to assume that protective orders may be undermined and that they must confine the scope of discovery taken against them as narrowly as possible to protect themselves against later loss of protection under those orders (*see* petition, pp. 17-30).

Moreover, both the Government and petitioners have every incentive to brief the questions and to secure a decision from this Court at the earliest possible date. The Government's desire to appropriate the fruits of discovery in *MCI* and *Litton* is currently blocked by the stays of the order of the district court below continued by Mr. Chief Justice Burger and of the order of the *MCI* district court continued by the Seventh Circuit. Petitioners are involved in numerous actions brought against them in which discovery is

proceeding under protective orders like the protective orders in *MCI* and *Litton*. Thus, petitioners have every interest in knowing at the earliest possible moment whether or not they may place confidence in those protective orders, particularly in view of the fact that Pretrial Order No. 11, in combination with Pretrial Order No. 12, threatens to deprive petitioners of their right to prepare and present their defense—a threat which petitioners have every incentive to remove at the earliest possible moment (see petition, pp. 30-36).

Finally, petitioners and the Government are in a position as good as any pair of litigants could be to brief the question in this Court fully and on an accelerated basis. Both parties have repeatedly briefed the issues involved in the petition during proceedings before two district courts and two courts of appeals, thus assuring that the presentation of the issues to this Court will be as full and complete as it ever will be.

In these circumstances the granting of petitioners' motion for expedited consideration would be beneficial to everyone concerned. This Court has granted expedited consideration of proceedings in the past when the interests similarly were served by expedition, as in *Penn-Central Merger and N&W Inclusion Cases*, 389 U.S. 946, 947 (1967). Petitioners are prepared to meet any schedule which would be convenient for the Court in connection with the disposition of the petition for certiorari and the resolution of the cause on the merits, including early dates for the briefing and argument of the cause.

CONCLUSION

For the foregoing reasons, the Motion to Accelerate should be granted.

Respectfully submitted,

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November 7, 1978

Supreme Court, U. S.
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No. 78-761

In the Supreme Court of the United States

OCTOBER TERM, 1978

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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No. 78-761

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unreported. The district court's initial opinion and its opinion denying reconsideration (Pet. App. 2a-69a, 81a-90a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1978. The petition for a writ of certiorari was filed on November 7, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals abused its discretion in denying an extraordinary writ to vacate an order of the district court requiring petitioners to turn over particular relevant documents.

STATEMENT

On November 20, 1974, the United States filed a civil action charging petitioners with monopolization, attempted monopolization, and conspiracy to monopolize telecommunications service and telephone equipment, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2.[1] This case is one of the largest antitrust suits ever filed and litigated by the United States. Almost from the start, however, proceedings were stayed as petitioners pressed in the district court, the court of appeals and this Court the argument that the case should be dismissed on the ground of implied antitrust immunity.[2] Significant discovery did not begin in this suit until more than three years after its filing.

Although discovery is just starting in the government's case, discovery was far advanced, or even completed, in some of the private antitrust cases that had been filed against AT&T. The United States realized that it could greatly reduce the cost and greatly increase the pace of pretrial proceedings if it could streamline the traditional multi-million page document searches and the depositions that typify "big" cases by using the discovery already accomplished in private cases involving claims similar to those of the present case.

MCI and *Litton* are two such cases.[3] The government's contentions in the present case include allegations arising

[1] *United States* v. *American Telephone & Telegraph Co.*, Civ. No. 74-1698 (D.D.C.).

[2] *United States* v. *American Telephone & Telegraph Co.*, 427 F. Supp. 57 (D.D.C. 1976), cert. before judgment denied, 429 U.S. 1071 (1977), cert. denied, No. 77-1009 (D.C. Cir. May 26, 1977), cert. denied, 434 U.S. 966 (1977). Petitioners continue to press this issue, and the district court had again rejected their position that the antitrust laws do not apply to their activities. See Pet. App. 8a-28a.

[3] *MCI Communications Corp.* v. *American Telephone & Telegraph Co.*, Civ. No. 74 C 633 (N.D. Ill. 1974), petition for a writ of

out of petitioners' conduct toward MCI and Litton, and material relevant to the *MCI* and *Litton* cases is therefore also relevant to the government's case.[4] MCI's counsel have viewed more than seven million pages of documents produced in discovery, selecting, copying, microfilming, analyzing and indexing approximately 1.5 million relevant pages. Litton's counsel went through the same process, selecting one million pages from a total of five million.[5] AT&T has microfilmed the 2.5 million documents selected by counsel for MCI and Litton. AT&T also has examined and copied more than eight million pages of MCI documents; it has examined five million pages of Litton documents and copied at least two million.

The discovery in *MCI* and *Litton*—now almost finished—was governed by protective orders. The *MCI* order provided that any party could "file a motion with the Court that [any] material [initially treated as confidential] should not be deemed confidential" (Pet. App. 104a-105a para. 5). The *Litton* proctective order permitted application for "the disclosure of confidential materials to governmental officials or counsel for parties in similar actions" (Pet. App. 112a-113a para. 10).

In November 1977 the United States filed a motion in *MCI* requesting modification of the protective order to allow MCI to disclose to the United States copies of AT&T employee depositions and microfilm copies of AT&T documents selected by MCI counsel as relevant to

mandamus docketed, No. 78-2316 (7th Cir. Oct. 16, 1978), appeal docketed, No. 78-2317 (7th Cir. Oct. 16, 1978); *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.*, No. 76 Civ. 2512 (S.D.N.Y. 1976). MCI has been a competitor of AT&T in long-distance communications. Litton is a supplier of telephone equipment.

[4] Both *MCI* and *Litton* have moved through pretrial proceedings much faster than this suit.

[5] Pet. App. 46a n.75. AT&T currently is defending some 40 antitrust suits that entail discovery relevant to this case.

its case.[6] The *MCI* district court, while indicating its agreement with the government's position, declined to modify the order until it could determine whether the United States District Court for the District of Columbia (in which the government's suit is pending) had any objection to such a change.

The United States in the meantime filed with the District of Columbia court a motion to require petitioners to produce their microfilm copies of the documents they had turned over to MCI and Litton and that were selected for use by the private plaintiffs. Petitioners stated a willingness to produce the documents, but only in paper form and only as an unidentifiable portion of the mass of millions of documents that AT&T had provided to MCI, Litton and other private parties (Pet. App. 46a n.74).

The District of Columbia court granted the United States' motion. It found that the documents sought are both relevant and non-privileged (Pet. App. 48a-55a).[7] It held that the prior selection of the documents in other litigation by MCI's and Litton's counsel did not excuse petitioners from producing them in this case, for petitioners had no valid claim of work product privilege concerning documents chosen by private counsel. *Id.* at 47a. The court determined that production "will ease the government's discovery burden and speed this litigation along" and that petitioners "have no legal interest in making the government's accumulation of proof more difficult or in delaying a trial on the merits." *Ibid.* In order to ensure that the case would not be further delayed, the court established a litigation plan under which the

[6]A similar motion is pending in *Litton*.

[7]The court established a mechanism to enable petitioners to preserve for judicial determination any claims of privilege they may have (Pet. App. 53a-55a).

parties would complete discovery by April 1, 1980. *Id.* at 57a-69a.[8]

The district court ordered petitioners to produce the documents by November 1, 1978, but "as a matter of comity and courtesy" sought the endorsement of the *MCI* and *Litton* district courts. *Id.* at 56a n.90.[9] On October 9, 1978, the Illinois court granted in full the United States' motion to amend the protective order. Pet. App. 91a-95a. The latter court agreed "wholly with Judge Greene's comments about the desirability of avoiding unnecessary duplication of discovery in these two cases" (*id.* at 92a) and rejected AT&T's contention that disclosure would unfairly prejudice it in the government's case. *Id.* at 92a-95a. The *MCI* protective order, the Illinois court ruled, "is in terms subject to change by further order of court" and could not reasonably be read to provide "a lifetime guaranty" of nondisclosure. *Id.* at 93a. Finally, after reviewing the facts, the court found not credible AT&T's new assertion that the government's former chief trial lawyer had in 1974 promised petitioners that the government would never seek MCI's discovery. *Id.* at 93a-95a.[10] *The Litton* court also indicated that it had no objection to the District of Columbia court's procedure.

[8]The court also rejected several other arguments of petitioners. It rejected their renewed contention of lack of jurisdiction (Pet. App. 8a-28a) and held that agencies and departments of the Executive Branch will be treated as the United States for purposes of discovery, but that independent regulatory agencies would be treated as third parties (*id.* at 28a-42a).

[9]Because the United States had not discussed whether "additional factors" were present respecting the depositions taken in the private litigation, the court denied without prejudice the government's motion with respect to those items. Pet. App. 56a n.91.

[10]AT&T had not mentioned this matter when it briefed and argued the government's motion before the Illinois district court in 1977.

On October 18, 1978, the District of Columbia court issued an opinion denying a petition for reconsideration.[11] Pet. App. 81a-90a. It rejected petitioners' contention that "because the *MCI* and *Litton* documents are under protective orders, they are beyond the reach of discovery here." *Id.* at 86a.[12] The court also adopted the *MCI* court's analysis of the United States' alleged promise never to seek MCI's discovery. *Id.* at 84a-86a.

On October 25, 1978, petitioners filed their petition for a writ of mandamus in the United States Court of Appeals for the District of Columbia Circuit. On October 31, 1978, that court summarily denied mandamus (Pet. App. 1a). On November 1, 1978, petitioners filed in this Court an application for a stay. The November 2, 1978, order of the Chief Justice continuing the short stay of the court of appeals was vacated, and the application for stay was denied, on November 13, 1978. That day petitioners delivered to the United States microfilm copies of the disputed documents.

ARGUMENT

The court of appeals' decision is correct, does not conflict with any decision of this Court or any court of

[11]Before the District of Columbia court could rule, AT&T challenged the order in *MCI* by appeal and petition for a writ of mandamus. Both are pending in the United States Court of Appeals for the Seventh Circuit. *MCI Communications Corp.* v. *American Telephone & Telegraph Co.*, Nos. 78-2316 and 78-2317 (7th Cir. Oct. 16, 1978).

[12]The court observed that petitioners "are arguing in the U.S. Court of Appeals for the Seventh Circuit * * * that the *MCI* court is without authority to lift a protective order once entered. If these contentions are correct, defendants would be immunized, as a practical matter, from ever having to provide adequate discovery in this action" (Pet. App. 86a). It held that "there is no basis for concluding that the court in which [documents] happen to have been produced first has the power, by virtue of that fact, to preclude their production when a litigant in another action legitimately requires them for the preparation of his case." *Id.* at 86a-87a (footnotes omitted).

appeals, and does not present any issue warranting plenary review.

1. The sole question presented by the petition is whether the court of appeals abused its discretion by refusing to issue a writ of mandamus that would set aside the district court's order that AT&T turn over 2.5 million relevant, non-privileged documents as a distinct group rather than indistinguishably intermingled with 9.5 million unwanted documents.

Mandamus is a remedy peculiarly within the discretion of an appellate court. Even if the court may grant mandamus in a particular case of contested discovery, we are aware of no principle requiring it to do so. To the best of our knowledge this Court has never reversed the denial of mandamus in a case dealing with documentary discovery. See *United States Alkali Export Association, Inc.* v. *United States*, 325 U.S. 196, 202 (1945) (mandamus unavailable even though the wait until final judgment caused hardship); *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 30 (1943) (same).[13]

This Court's reluctance to interfere with court of appeals' discretion in this area springs from the nature of mandamus itself. "[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation" of mandamus. *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976). That rule is especially appropriate when, as here, petitioners seek mandamus to upset an order concerning discovery in a pending case. See *Will* v. *Calvert Fire Insurance Co.*, No. 77-693 (June 23, 1978). There is a strong policy against

[13]Petitioners' reliance (Pet. 2) on *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964), is misplaced. That case, which was the first challenge to a court's power under Fed. R. Civ. P. 35, involved not discovery in the traditional sense but the very different and extremely personal matter of physical and mental examination of a party.

piecemeal review of cases, and the great number of discovery rulings that may be made in any case counsels against appellate intervention to review claims of simple mistake.[14] This is all the more so where, as here, the documents whose production is disputed have already been turned over to the government.

The district court's decision was not a usurpation of power; it was plainly right. The United States sought some 2.5 million relevant and specifically identified documents that petitioners microfilmed and maintained in a separate file. Thus they could be, and indeed have been, produced to the United States with a minimum of inconvenience to petitioners. Petitioners, who were willing to produce them without a claim of privilege, made it plain to the district court that they desired to flood the United States with some 9.5 million unwanted documents that would disguise the identity of the documents the United States sought. The district court's discovery order properly rejected petitioners' tactic and helped to ensure that this massive case, plagued by inordinate delay, will at last move forward in an orderly fashion. The order will assist the parties in meeting the court's discovery schedule, and the United States has not received a single document that it would not have received under petitioners' proposal.

Petitioners do not argue that the district court abused its discretion;[15] they maintain, instead, that it had no

[14]The court of appeals here properly applied the established rule that where there is an adequate alternative means of relief mandamus will not lie. See *Kerr, supra,* 426 U.S. at 403.

[15]Petitioners' brief suggestion that the district court abused its discretion in relying on the findings of the *MCI* district court that the government had not promised petitioners never to seek *MCI*'s discovery (Pet. 16) is insubstantial. It is highly doubtful that an abuse of discretion in discovery is reviewable at all by extraordinary writ, *Will* v. *Calvert Fire Insurance Co., supra,* slip op. 9 n.7, where there

discretion. But they cite no authority for the proposition that a court must permit a defendant to swamp the plaintiff with unwanted documents, when the wanted documents already have been segregated and identified. Petitioners simply seek to tie the hands of the court in a way that would be at odds with the need to assure "just, speedy, and inexpensive" determinations of actions. Fed. R. Civ. P. 1. Petitioners' position, as the district court found, would increase litigation costs for no good purpose, enlarge delay and work to the end of denying justice (Pet. App. 47a-48a).

Petitioners' assertion (Pet. 17-20) that the district court's ruling conflicts with other decisions on point is wrong. No decision holds that a district court loses its discretion under Fed. R. Civ. P. 34 to order one party to produce relevant, non-privileged documents to its adversary party simply because lawyers in some other litigation have identified the documents as relevant. Most of the cases cited by petitioners do not even deal with the situation presented here of Rule 34 discovery by one party of the other's documents.[16] Instead, they involve dis-

would be adequate remedy on an eventual appeal from the final judgment. In any event, the *MCI* court carefully discussed petitioners' contention and found the assertion incredible (Pet. App. 92a-95a). There was no need for the district court to recanvas an issue decided by a coordinate court.

[16]*GAF Corp* v. *Eastman Kodak Co.*, 415 F. Supp. 129 (S.D. N.Y. 1976); *United States* v. *GAF Corp.*, 1978-1 Trade Cas. para. 62,015 (S.D. N.Y. 1978); *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 1978-1 Trade Cas. para. 61,961 (E.D. Pa. 1976); *Martindell* v. *International Telephone & Telegraph Corp.*, 25 F.R. Serv. 2d 1283 (S.D. N.Y. 1978); *Data Digests, Inc.* v. *Standard & Poor's Corp.*, 57 F.R.D. 42 (S.D. N.Y. 1972); *Milsen Co.* v. *Southland Corp.*, 1972 Trade Cas. para. 73, 865 (N.D. Ill. 1972); *In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases,* 18 F.R.Serv. 2d 1251 (N.D. Cal. 1974); *Alcoa* v. *United States Department of Justice,* 1978-1 Trade Cas. para. 61,824 (D. D.C. 1978); *Wyly Corp.* v. *American Telephone & Telegraph Co.*, Civ. No. 76-1544 (D. D.C. 1976); *William Inglis & Sons Baking Co.* v. *ITT*

cretionary district court decisions whether to impose or modify protective orders where non-parties sought the parties' documents. Moreoever, petitioners do not take into account cases where district courts exercised their discretion and refused to issue (or modified) a protective order so that other litigants could use the material in their own cases.[17] Two decisions cited by petitioners that do deal with Rule 34 discovery do not stand for the proposition that the court lacks discretion.[18] And, at all events, none of the cases cited by petitioners involves a decision by a court of appeals to issue mandamus to forbid disclosure; there is, therefore, no arguable conflict

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Continental Baking Co., No. C-71-1906-SW (N.D. Cal. Sept. 30, 1974); *TV Signal Co. of Aberdeen* v. *American Telephone & Telegraph Co.*, Civil Action No. 70-6N (D. S.D. July 14, 1978); *In re Cement and Concrete Antitrust Litigation*, Civ. No. 76-788A PHX CAM (D. Ariz. 1978).

[17]The only appellate decision on this question held that it was an abuse of discretion for the district court *not* to modify a protective order for the benefit of third party litigation. *Olympic Refining Co.* v. *Carter*, 332 F. 2d 260 (9th Cir. 1964); See also, *e.g.*, *Williams* v. *Johnson & Johnson*, 50 F.R.D. 31 (S.D. N.Y. 1970); *Johnson Foils, Inc.* v. *Huyck Corp.*, 61 F.R.D. 405 (N.D. N.Y. 1973) (both refusing to issue protective orders); *Essex Wire Corp.* v. *Eastern Electric Sales Co.*, 48 F.R.D. 308 (E.D. Pa. 1969) (denied in part); *American Security Co.* v. *Shatterproof Glass Corp.*, 20 F.R.D. 196 (D. Del. 1957); *United States* v. *International Business Machines Corp.*, 67 F.R.D. 40 (S.D. N.Y. 1975) (all four modifying protective orders.)

[18]See *United States* v. *ARA Services, Inc.*, 1978-2 Trade Cas. para. 62,250 (E.D. Mo. 1978); *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 1978-1 Trade Cas. para. 62,019 (E.D. Pa. 1978). Both of these cases simply express discretionary judgments different from the one here. Moreover, both these decisions relied entirely on *GAF Corp.* v. *Eastman Kodak Co.*, 415 F. Supp. 129 (S.D. N.Y. 1976), and, as the court here observed, *GAF* turned on its unusual facts. There the United States sought Kodak documents discovered by GAF before the government had made any decision whether or not to bring its own litigation. The court expressed concern that disclosure of the documents selected by an adversary might unfairly influence the government's discretion to initiate proceedings—especially criminal proceedings. In the present case, by contrast, the United States filed suit long ago and merely seeks documents under Rule 34 for this case.

among the circuits on the availability of mandamus for this end.

Petitioners' effort to strip the district court of discretion is in reality an attempt to create a new form of work product privilege, under which they can assert a privilege in MCI's or Litton's work product. The district court correctly held that neither Fed. R. Civ. P. 26(b), which sets forth the contours of work product privileges, nor anything else authorizes such a startling inversion of that doctrine. Pet. App. 47a.[19]

Finally, petitioners' contention that review should be granted because the district court's order puts them at a disadvantage in discovery (Pet. 30-36) is frivolous. The district court carefully examined this contention and found it to be without merit (Pet. App. 53a n.86).[20] Review of such a determination is not the office of mandamus. *Will* v. *Calvert Fire Insurance Co.*, *supra.*

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[19]Both Litton and MCI, whose work products are involved, have stated that they have no objection to the government's discovery.

[20]Petitioners in fact are well ahead of the United States in discovery. While discovery in this case was stayed for three years, AT&T was able to conduct extensive and useful discovery in private cases where the issues are the same as some of those in the government's case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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